

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
REFERRAL BY THE COMMISSIONER OF ADMINISTRATION**

In the Matter of:	)	
	)	
DATA TRANSFER SOLUTIONS, LLC	)	
	)	
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES	)	OAH No. 15-1545-PRO RFP No. 2515H005
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**REVISED DECISION**

**I. Introduction**

Data Transfer Solutions, LLC, more commonly known as DTS, was the unsuccessful offeror in a request for proposals to develop and implement a trio of web-based asset management systems for the Department of Transportation and Public Facilities (DOT&PF). After DOT&PF gave notice of its intent to award the contract to AgileAssets, Inc. (“Agile”), DTS protested to the procurement officer, who denied the protest. DTS then filed this appeal and received a full hearing. The evidence taken at hearing and in the record as a whole showed that the selection of Agile was reasonable, and that no procedural defects in the procurement materially prejudiced DTS. Accordingly, DTS’s appeal is denied.<sup>1</sup>

**II. Facts**

**A. RFP Background and Overview**

The Department of Transportation and Public Facilities (“DOT&PF”) is responsible for the planning, construction, maintenance and repairs of the transportation assets throughout Alaska.<sup>2</sup> DOT&PF presently uses three separate software systems to facilitate its management of these assets. These are (1) a spreadsheet-based pavement management system (PMS); (2) an Oracle-based maintenance management system (MMS) developed by a contractor but now programmed by DOT&PF; and (3) an equipment management system (EMS) supporting “fleet

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<sup>1</sup> The administrative law judge’s proposed decision was distributed to the parties on March 23, 2016. The parties timely submitted Proposals for Action pursuant to AS 44.64.060(e). This revised decision corrects several typographical errors identified in DOT&PF’s Proposal for Action, *nunc pro tunc* to March 23, 2016. 2 AAC 64.350(a).

<sup>2</sup> R. 1531.

and equipment management activities.”<sup>3</sup> RFP No. 2515H005, “Alaska Asset Management Systems for Pavement, Maintenance and Equipment,” was the result of the lengthy consultation and development process to replace these systems with integrated web-based asset management systems for all three asset types.<sup>4</sup>

The procurement officer for the RFP was DOT&F Procurement Specialist Rebecca Gattung, the contract manager for all non-construction contracts within DOT&PF’s statewide procurement section. Ms. Gattung has worked for DOT&PF for sixteen years, including nine in her current position, and, in describing the scope of her job responsibilities, identified as “ultimately [her] responsibility . . . all contracts that go out our door.”<sup>5</sup> Throughout the creation, refinement and amendment of the RFP, and during eventual negotiations with the highest-scoring offeror, Ms. Gattung worked closely with DOT&PF engineer Carolyn Morehouse, the project manager for the asset management system.<sup>6</sup>

RFP No. 2515H005 was issued on September 22, 2014.<sup>7</sup> The RFP was 45 pages long, with more than one hundred pages of technical attachments. These included a 52-page “Concept of Operations” document (identifying 15 “universal needs” for the system as a whole, 10 needs specific to the PMS, 13 needs specific to the MMS, and 21 needs specific to the EMS),<sup>8</sup> as well as a 57-page “System Requirements” document (setting out hundreds of specific requirements for each system under various operational scenarios).<sup>9</sup>

DOT&PF received proposals from four offerors.<sup>10</sup> One offer was deemed nonresponsive; the remaining three proposals –including proposals from DTS and AgileAssets – were provided to the Proposal Evaluation Committee (PEC) in December 2014.<sup>11</sup> After holding product demonstrations, the PEC met in January 2015.<sup>12</sup> AgileAssets and DTS were the two highest scoring proposals, with Agile receiving an average score of 83.29 of 100 possible points, and

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<sup>3</sup> R. 1531.

<sup>4</sup> See R. 73-75, 1531-1534, 3175-3183; Gattung testimony.

<sup>5</sup> Gattung testimony.

<sup>6</sup> Gattung testimony; Morehouse testimony.

<sup>7</sup> R. 51-234. Four Amendments were issued before proposals were eventually submitted in November 2014. R. 235-237, 429-430.

<sup>8</sup> R. 123-174.

<sup>9</sup> R. 175-231. The RFP itself identified these as all the requirements “needed for a full functioning PMS, MMS, and EMS,” but provided that “offerors need not meet all system requirements.” See R. 86-87 (Section 6.05, Proposed Solution and the Ability to Meet Requirements).

<sup>10</sup> R. 238-426, 434-592, 626-1192, 1193-1362.

<sup>11</sup> R. 3166.

<sup>12</sup> R. 46; R. 3166.

DTS receiving 76.65. Within the seven-member PEC, four members – Diane Rotkis, Jim Horn, Steve Potter and Todd Vanhove – ranked Agile higher,<sup>13</sup> while the other three – Carolyn Morehouse, Jill Sullivan and Karen Zubilaga – ranked DTS higher.<sup>14</sup>

## **B. Development of Amendment 5**

Following the PEC meeting, however, concerns arose within DOT&PF about whether the RFP was sufficient to meet the needs it was intended to address.<sup>15</sup> Eventually, the decision was made to amend the RFP to address these concerns.<sup>16</sup>

A team from DOT&PF’s Information Support Services Division (“ISSD”) was assigned to provide technical guidance in drafting the Amendment, which would become Amendment 5.<sup>17</sup> One of ISSD’s recommendations was to require offerors to conduct on-site software demonstrations in remote locations. Previous software demonstrations had basically been sales demonstrations, rather than demonstrating how the products would actually work for DOT&PF. Accordingly, it was decided that the three highest-scoring offerors would be asked to conduct live product demonstrations in two remote locations.<sup>18</sup>

The PEC that evaluated the original proposals had seven members. After adding the new requirement of remote demonstrations, DOT&PF also decided to reduce the size of the PEC as a cost-saving measure.<sup>19</sup> The PEC that eventually evaluated the proposals consisted of Chris Kotyk, Steve Potter, and Brad Bylsma. Ms. Morehouse initially selected the PEC members and provided the names to Ms. Gattung.<sup>20</sup> Mr. Kotyk is a DOT&PF software analyst and computer programmer with extensive experience in asset management systems, particularly MMS and, to a lesser extent, EMS and PMS. Mr. Potter has worked for DOT&PF for 30 years, is the maintenance and operations chief for DOT&PF’s northern region, and works extensively with

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<sup>13</sup> R. 46 (Rotkis (76.5/65); Horn (94.5/59); Potter (77.5/68); Vanhove (89.5/85)). Jim Horn was particularly negative about DTS (awarding DTS only 59 points versus 94.5 to Agile (and awarding the third bidder even fewer points than he awarded DTS)). R. 4701-4705, 4711-4715.

<sup>14</sup> R. 46 (Morehouse (82.5/74.5), Sullivan (85.5/83); Zubilaga (91.5/87.5)).

<sup>15</sup> *See, e.g.*, R. 1379, 1388-1396, 1392-1396, 1398-1422, 5859-5865.

<sup>16</sup> *See* R. 4511.

<sup>17</sup> Kotyk testimony; R. 1432.

<sup>18</sup> Kotyk testimony; R. 5866-5871.

<sup>19</sup> Gattung testimony, Morehouse testimony.

<sup>20</sup> Gattung testimony. The third PEC member was originally intended to be State Equipment Fleet Manager Diana Rotkis. In late May 2015, scheduling issues led to Ms. Rotkis being replaced by Mr. Bylsma. Testimony of Bylsma, Rotkis, Gattung. Contrary to DTS’s insinuations during the hearing, Ms. Rotkis did not share with Mr. Bylsma any opinions of either proposal, nor did she otherwise attempt to influence Mr. Bylsma’s evaluation of the proposals. Testimony of Bylsma, Rotkis.

DOT&PF's current MMS. Mr. Bylsma joined DOT&PF in 2000, has served as the state equipment fleet parts manager since 2005, and works extensively with DOT&PF's current EMS.<sup>21</sup> All three PEC members were involved in the process that led to the eventual development of the RFP.<sup>22</sup>

### **C. Amendment 5 to RFP**

On April 23, 2015, DOT&PF issued Amendment 5, making fourteen specific changes to the RFP and soliciting revised proposals due May 15, 2015.<sup>23</sup> Amendment 5 changed the RFP "dramatically."<sup>24</sup> Among its changes, Amendment 5 amended the Systems Requirement document (Attachment 2), as well as other sections of the RFP.<sup>25</sup> The Amendment also included a new attachment, Attachment 4: "Proposed Solution Verification," intended to allow DOT&PF "to clarify how certain requirements will be met by the proposed solution with specific questions."<sup>26</sup>

Under Amendment 5, the proposal evaluation form was modified to include a category for the live, on-site demonstrations, and to adjust scoring from a 100-point scale to a 1000-point scale, as follows:

- 7.01 Understanding of the Project: 5 percent;
- 7.02 Management Plan for the Project: 5 percent;
- 7.03 Proposed Solution and the Ability to Meet Requirements: 35 percent;
- 7.04 Experience and Qualifications: 5 percent;
- 7.05 Contract Cost: 30 percent; and
- 7.06 Live and On-Site Software Demonstrations: 20 percent.<sup>27</sup>

As in the original RFP, all items other than cost were to be scored by each evaluator, and for each item a series of questions was provided against which evaluators were to evaluate each proposal on that item.<sup>28</sup> Additionally, Amendment 5 provided for a two-phased evaluation

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<sup>21</sup> Bylsma testimony.

<sup>22</sup> DOT&PF circulated a Request for Information (RFI) in early 2014 as a precursor to the eventual September 2014 RFP. R. 3175-3183. All three PEC members had some involvement in that initial process. Testimony of Kotyk, Potter and Bylsma.

<sup>23</sup> R. 1451-1582. DOT&PF issued Amendment 6, a further clarification, on April 24, 2015. R. 1583. Additional Amendments 7, 8, 9 and 10 were then issued between May 5-13, 2015. R. 1584-1594, 2188-2189.

<sup>24</sup> Gattung testimony.

<sup>25</sup> R. 1458-1519.

<sup>26</sup> R. 1520-1526.

<sup>27</sup> R. 1558-1570, 1594 (Amendment 10: correcting numbering in original Proposal Evaluation Form).

<sup>28</sup> R. 1558-1570. The score for cost was determined by the procurement officer. Prior to the issuance of the original RFP, the Chief Procurement Officer granted a request by the procurement officer to reduce from 40% to 30% the minimum weight given to cost. R. 4770-4771. Under the terms of the RFP, the lowest bidding offeror would receive the full thirty percent (under Amendment 5, the full 300 points), with higher bidding offerors

process, with all responsive proposals being evaluated by the PEC (Phase I), and the three top-scoring proposals then advancing to Phase II – live, on-site software demonstrations in two remote locations.<sup>29</sup> The Evaluation Form reflected this two-phase approach.<sup>30</sup>

Ultimately, DOT&PF received only two responsive proposals – one from Agile and one from DTS.<sup>31</sup> Because of the technical nature of the procurement, the proposals were hundreds of pages long, and included lengthy technical attachments.<sup>32</sup> Both offerors also submitted sealed cost proposals— DTS’s for \$7,172,593.24, and Agile’s for \$8,568,173.<sup>33</sup>

#### **D. Scheduling the June 2015 PEC Meeting**

Upon receiving the proposals, the procurement officer provided each member of the PEC a copy of both offerors’ technical proposals, as well as a memorandum about the evaluation process, the RFP evaluator’s guide, and a non-conflict form for the evaluator’s signature.<sup>34</sup> The procurement officer did not provide the PEC members any information about either offeror’s cost proposal; this information is intentionally kept under separate cover and reviewed only by the procurement officer.<sup>35</sup>

In late May and into June 2015, the procurement officer worked internally and with both offerors to schedule live demonstrations in two remote locations, Nome and Montana Creek.<sup>36</sup>

Because the RFP contemplated two PEC meetings, one of which would precede live demonstrations, the procurement officer also worked with PEC members to schedule a PEC meeting in advance of the live demonstrations. A meeting was initially scheduled for June 1, and was then rescheduled to June 4 to accommodate members’ schedules.<sup>37</sup> On the day of the June 4 meeting, the procurement officer was not sure that all members of the PEC would be ready in time for the meeting.<sup>38</sup> Both because of difficulties with scheduling a separate PEC meeting

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receiving a percentage of that amount. *See* R. 66, 94, 1563. DTS originally objected to the scoring of cost at only 30%, but later withdrew this appeal ground.

<sup>29</sup> R. 1543.

<sup>30</sup> R. 1558-1570.

<sup>31</sup> R. 1597-2187, 2718-2931. A third proposal was found to be non-responsive. R. 3167.

<sup>32</sup> R. 2729-2931 (DTS), 1615-2187 (Agile).

<sup>33</sup> R. 2718-2728; R. 1597-1614.

<sup>34</sup> R. 2190-2204.

<sup>35</sup> Gattung testimony (“We hold that information away from the evaluation members. They are only evaluating the technical side of it.”); Kotyk testimony.

<sup>36</sup> R. 2221, 2222.

<sup>37</sup> R. 2190, 2206, 4925, 4936; Gattung testimony.

<sup>38</sup> In particular, Mr. Potter informed Ms. Gattung that he was not sure he could have both proposals evaluated before the meeting; the newest committee member, Mr. Bylsma, had only told her that he “thought” he could be ready; and Mr. Kotyk had emailed Ms. Gattung the evening of June 3 because he had not yet received electronic

before the live demonstrations, and because a preliminary “Phase I” meeting was not necessary to identify the top scoring offerors who would proceed to demonstrations, the procurement officer emailed the PEC members on June 4, 2015, proposing to replace the phased meeting approach with a single PEC meeting after the live demonstrations.<sup>39</sup> All members of the PEC agreed with this proposal.<sup>40</sup> Accordingly, rather than holding a “Phase I” PEC meeting before the software demonstrations, the PEC instead held one single meeting after demonstrations were completed. Neither offeror was notified about this change.

#### **E. Live Demonstrations**

The RFP set out detailed requirements for the live product demonstrations, describing for each location a detailed factual scenario in which the products would be used, and requiring each offeror to showcase its products’ performance in response to each scenario.<sup>41</sup> Additionally, each offeror was required to conduct five “system checks” at each location, and given detailed instructions as to the content of such checks and the required reporting of the resulting data.<sup>42</sup>

The software demonstrations were conducted in Nome on June 16-17, 2015, and in Montana Creek on June 18-19, 2015. Both locations were chosen for their remoteness, and because of the need for the offerors to demonstrate that their products could function well in such settings.<sup>43</sup> All three PEC members, a DOT&PF IT employee, and staff from each offeror attended the demonstrations on-site; the procurement officer participated telephonically.<sup>44</sup>

In Montana Creek, a DOT&PF station north of Fairbanks, the internet connection is via satellite.<sup>45</sup> It was important to ISSD to see how the two offerors’ products performed when network connectivity was lost. During the demonstrations, both offerors demonstrated their products’ offline capabilities. For Agile, this occurred when the internet connection at Montana Creek failed. In its protest and during the evidentiary hearing, DTS contended the connectivity issues during Agile’s demonstration were indicative of some shortcoming in Agile’s product, and sought to challenge the scoring of Agile’s live demonstration in light of this failure. But the

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versions of Agile’s complete proposal. Gattung testimony; R. 4932; Potter testimony. Ms. Gattung was finally able to transmit the proposal electronically to Mr. Kotyk shortly after 9 a.m. on June 4, and then emailed the PEC group about rescheduling shortly thereafter. R. 4935-4936.

<sup>39</sup> R. 4936.

<sup>40</sup> R. 4949 (Bylsma), 4950 (Potter), 4956 (Kotyk).

<sup>41</sup> R. 1544-1550.

<sup>42</sup> R. 1550-1551; R. 4565-66.

<sup>43</sup> See R. 1534.

<sup>44</sup> Gattung testimony; Kotyk testimony; Bylsma testimony; Potter testimony.

<sup>45</sup> Kotyk testimony; R. 4568.

failure that occurred during Agile’s demonstration was a failure of the location’s satellite internet connectivity, a frequent occurrence at Montana Creek and not within the control of or related to any software run at the site.<sup>46</sup> Agile continued and completed its demonstration despite the site’s connectivity issues.<sup>47</sup> It was not responsible for the connectivity issues, and the only relevance of those issues to Agile’s demonstration was in its showcasing its product’s offline functionality – a valuable attribute given the intermittent nature of internet access in some DOT&PF sites.<sup>48</sup>

The RFP required both offerors to complete five different “system checks” during the demonstrations, and provide “a detailed report which clearly displays all metrics collected for analysis.”<sup>49</sup> Agile successfully completed all five of these tasks; DTS completed only one of the five.<sup>50</sup> This influenced Mr. Kotyk and Mr. Potter in their scoring of the live demonstrations.<sup>51</sup>

## **F. The June 2015 PEC Meeting**

### **1. Scoring Overview**

After the live demonstrations were completed, the PEC met by phone on Monday, June 22, 2015.<sup>52</sup> The evaluation form directs each committee member to score each offer in five categories: “understanding,” “management plan,” “solution meets requirements,” “experience & qualifications,” and “software demonstrations.”<sup>53</sup> Each committee member had independently reviewed the materials and scored his evaluation before that meeting.<sup>54</sup> During the meeting, the procurement officer asked each member’s score for a given category. After all three had

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<sup>46</sup> Kotyk testimony.

<sup>47</sup> Kotyk testimony.

<sup>48</sup> Kotyk testimony; R. 1534.

<sup>49</sup> R. 1566-1567, 1569-1570. (For example: “(1) Provide a tool and capture latency statistics in milliseconds at an interval of no less than one measurement every 15 seconds for a duration of no less than thirty minutes to the server location where the demonstration is taking place”; “(5) Provide a tool and perform at least one file download of at least 100 Megabytes using a tool that captures data throughput and amount transferred at an interval of no less than one measurement every 15 seconds to the server location where the demonstration is taking place”).

<sup>50</sup> Kotyk testimony; R. 5017, 5020, 5032.

<sup>51</sup> Kotyk testimony; Potter testimony.

<sup>52</sup> R. 47.

<sup>53</sup> Scores for a sixth category, cost, were separately determined by the procurement officer using a formula set out in the RFP. It appears the procurement officer also determined one half of each offeror’s score for “experience and qualifications” based on business references she had obtained for each offeror. Neither party offered testimony about how these items were scored, nor was the scoring of references raised as an issue on appeal.

<sup>54</sup> Bylsma testimony; Kotyk testimony; Potter testimony. The instructions provided to PEC members instruct the evaluators to read through the proposals without evaluating them, and to then read through again a second time. Scoring of each section then begins at the neutral mid-way point (e.g. for an item with 50 possible points, the evaluator should begin at a 25), with the evaluator then adjusting the score up or down as he deemed appropriate. R. 2191-2204; Kotyk testimony; Gattung testimony.

provided their scores for a given category, the procurement officer fostered discussions about any areas in which she noted possible discrepancies or other issues needing discussion.<sup>55</sup>

Each of the three PEC members scored Agile higher overall, and higher on every single discretionary category – that is, every numerical category where the PEC member, rather than the procurement officer, determined the score.<sup>56</sup>

### JUNE 2015 PEC SCORING

Topic (points available)	Bylsma		Kotyk		Potter	
	Agile	DTS	Agile	DTS	Agile	DTS
<b>7.01</b> Understanding (50)	40	25	35	10	35	20
<b>7.02</b> Management Plan (50)	40	30	40	10	40	20
<b>7.03</b> Solution Meets Requirements (350)	300	215	235	200	240	200
<b>7.04</b> Experience & Qualifications (25)	20	13	20	10	20	15
<i>Subcategory: References (25)</i>	<i>18.5</i>	<i>22.5</i>	<i>18.5</i>	<i>22.5</i>	<i>18.5</i>	<i>22.5</i>
<b>7.05</b> Cost (300)	251	300	251	300	251	300
Rater Subtotal	<b>669.5</b>	605.5	<b>599.5</b>	552.5	<b>604.5</b>	577.5
<b>7.06</b> Software Demonstrations (200)	155	110	138	100	140	100
<b>Rater total</b>	<b>824.5</b>	715.5	<b>737.5</b>	652.5	<b>744.5</b>	677.5
<b>Agile Assets average score: 768.83</b>						
<b>DTS average score: 681.83</b>						

Each evaluator testified credibly that his scores were not influenced by other members of the PEC, and instead represented his own, independent efforts to score each proposal fairly and honestly.<sup>57</sup>

#### 2. Bylsma Scoring

Within the PEC, Mr. Bylsma scored both offerors higher than either of his colleagues. Prior to the software demonstration, his score for DTS was 605.5, compared with 577.5 for Mr. Potter and 552.5 for Mr. Kotyk. Mr. Bylsma also gave both offerors higher scores for the software demonstration than either of his colleagues – 155 out of 200 points for Agile, and 110 points for DTS.<sup>58</sup>

Mr. Bylsma found the DTS proposal “fairly strong” as to pavement management, but “very weak” as to equipment management – his particular area of expertise – “to the point where

<sup>55</sup> Kotyk testimony; Bylsma testimony; Gattung testimony.

<sup>56</sup> R. 47.

<sup>57</sup> Bylsma testimony; Kotyk testimony; Potter testimony.

<sup>58</sup> R. 47.



[he] wasn't really sure that it was going to be acceptable."<sup>59</sup> Mr. Bylsma thought that Agile's proposal was not as strong as DTS's for PMS, "about neutral" with DTS for MMS, but "much better" than DTS's for the EMS side of the proposal.<sup>60</sup>

The live demonstrations "pretty well affirmed" Mr. Bylsma's conclusions from the written proposals. He felt DTS's proposal failed to address portions of the RFP setting out the DOT&PF's fleet requirements, and that both the written proposal and the live demonstration reflected a lack of comprehension of DOT&PF's business needs, or an unwillingness to accommodate those needs.<sup>61</sup> Mr. Bylsma was concerned that the state equipment fleet "would have a very difficult time moving their business into a system that had significant gaps in the things that we do now."<sup>62</sup> "Based on the materials that they offered and then what we saw at the live demos," Mr. Bylsma felt that the EMS part of DTS's proposal was "something that the fleet was going to have a very difficult time adapting to and using."<sup>63</sup>

### 3. Kotyk Scoring

Mr. Kotyk gave both offerors the lowest scores of any PEC member – initially, 599.5 for Agile and 552.5 for DTS. After the software demonstrations, his total score for Agile rose to 737.5, and DTS's score rose to 652.5 – both still the lowest scores among the three PEC members. Mr. Kotyk applied the same methodology throughout his scoring of each proposal. For each category on the score sheet, Mr. Kotyk considered the title of the overall category (e.g. "Understanding of the Project") and the number of points. As recommended in the evaluators' guide, he started with a neutral score – half of the available points – and adjusted up or down, using the questions listed on the score sheet as a guideline to further define the scope of the overall topic and inform his score.<sup>64</sup>

Like Mr. Bylsma, Mr. Kotyk had concerns about DTS's understanding of the "size and scope" of the project, and believed DTS's proposal reflected a "less than comprehensive

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<sup>59</sup> Bylsma testimony.

<sup>60</sup> Bylsma testimony.

<sup>61</sup> Mr. Bylsma was concerned that DTS responded to many of DOT&PF's stated business needs – such as the processes for purchasing parts, issuing work orders, making pool reservations, and billing other state agencies – either by stating that DOT&PF would need to use additional software to meet the need, or stating that DTS "might" later develop a module to address the need, "but nothing more detailed about using that software or how that would integrate with DTS."

<sup>62</sup> Bylsma testimony ("These are holes that the fleet business has to have filled. It can't be ignored, and it can't just not be done. Those are things that we do").

<sup>63</sup> Bylsma testimony.

<sup>64</sup> Kotyk testimony.

understanding of the project we were trying to do.” In his view, DTS’s identification of tasks often simply repeated what was written in the RFP, without setting out any specifics as to how their proposed solution could actually be implemented.<sup>65</sup>

In Section 7.02, Mr. Kotyk was concerned about DTS’s failure to provide a GANTT chart, instead providing only a schedule. From a project management perspective, Mr. Kotyk felt that this was a red flag, warranting a reduction of DTS’s score from the neutral starting point. Mr. Kotyk scored DTS higher than the neutral for 7.03, because he “liked a lot of what they proposed.” On the issue of references (section 7.04), Mr. Kotyk scored DTS slightly below neutral because he did not feel DTS’s references were good comparators to the size and scope of the Alaska project. Specifically, DTS identified Rhode Island, which Mr. Kotyk felt did not compare well with Alaska’s size, and Texas, which is closer in geographical size but in which DTS had implemented a much smaller scale project than this project.<sup>66</sup> Agile’s proposal, by way of contrast, specifically identified two state customers – Idaho and Wyoming – that “compare very favorably with respect to geography, network size and climate to the State of Alaska,” as well as two other states – North Carolina and Oklahoma – “which have multiple AgileAsset modules that have been in use for an extended period, but with different combinations.”<sup>67</sup> For the live demonstration, Mr. Kotyk scored DTS “right at the neutral.” He noted that DTS “lost points” for failing to provide the complete set of required system checks, but also gained points elsewhere, resulting, in his view, in a neutral score.<sup>68</sup>

#### 4. Potter Scoring

Mr. Potter’s scores were closer to Mr. Kotyk’s, with pre-demonstration subtotals of 604.5 for Agile and 577.5 for DTS.<sup>69</sup> Mr. Potter scored Agile 140 in the demonstration and awarded DTS only 100 points, resulting in final scores of 744.5 for Agile and 677.5 to DTS.

Mr. Potter wrote short notes on his score sheets, typically describing a proposal’s response in a particular area as “fair,” “good,” “poor,” “not very well,” et cetera.<sup>70</sup> In the

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<sup>65</sup> Kotyk testimony; R. 5855-5857.

<sup>66</sup> Kotyk testimony.

<sup>67</sup> R. 1625.

<sup>68</sup> Kotyk testimony.

<sup>69</sup> R. 5810-5822; 5784-5796. The closeness in scores – with fewer than 20 points separating the two proposals – is consistent with Mr. Potter’s testimony that he found both proposals acceptable, but that various “little things” gave Agile a slight edge in his judgment.

<sup>70</sup> R. 5010. On some portions of the Agile score sheet – but not all – he also assigned number values to the individual questions within a particular category. See R. 5023-5034.

software demos, Mr. Potter’s notes for DTS include the notation “1 out of 5,” and “5 out of 5” for Agile – a reference to the system checks issue.<sup>71</sup> Some notes for DTS’s demonstration say “good” or “fair”; others comment on particular issues (e.g. “fair – operators’s daily needs work”) or answer “yes” or “no” to specific questions (e.g. “Was the offeror able to produce a timesheets (sic) with lunch and breaks properly entered?” “No”).<sup>72</sup>

Of the three PEC members, Mr. Potter appeared to have the least clear recollection of the events at issue in this appeal. Nonetheless, he testified credibly that he reviewed and faithfully followed the guidelines given to him by the procurement officer, and that his judgment at the time of the evaluation was that both offerors had good systems for his purposes, but that Agile’s product was judged to be superior overall. Mr. Potter explained that he found Agile’s written materials and technical demonstration both easier to follow, and, although he had no strong objections to DTS’s proposal, Agile came out ahead.<sup>73</sup>

**G. Early July 2015: Initial Preparations for Negotiations with Agile**

On July 1, 2015, the procurement officer notified Ms. Morehouse, Mr. Kotyk, and Mike Coffey – DOT&PF’s Chief of Statewide Maintenance and Operations – that the PEC had scored Agile’s proposal more favorably.<sup>74</sup> RFP Section 2.13 (Contract Negotiation) authorizes the DOT&PF to engage in contract negotiations with the offeror of the highest ranked proposal, provided that those negotiations are “within the scope of the request for proposals and limited to those items which would not have an effect on the ranking of proposals.”<sup>75</sup> The procurement officer’s July 1, 2015 email stated she wanted “to begin negotiations before we issue a notice of intent so that we can negotiate price without exposing the other bidder costs,” and requested that Mr. Coffey, Ms. Morehouse, and Mr. Kotyk go through Agile’s proposal to determine whether any other issues need to be negotiated.<sup>76</sup> She asked the group to “develop a list of issues, questions, counter proposal, etc.,” including “any talking points or questions we can ask about why the cost is the way it is.”<sup>77</sup> Once a list was finalized, she indicated, she would present it to

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<sup>71</sup> R. 5015-5021, 5029-5032.  
<sup>72</sup> R. 5015-5021.  
<sup>73</sup> Potter testimony.  
<sup>74</sup> R. 2685.  
<sup>75</sup> R. 66.  
<sup>76</sup> R. 2685.  
<sup>77</sup> R. 2685.

Agile for a written response with the goal of adding a “negotiation issues” appendix to the contract.<sup>78</sup>

The group then exchanged internal emails about topics that members felt should be addressed before finalizing a contract with Agile.<sup>79</sup> On Tuesday, July 7, 2015, Mr. Kotyk circulated a six-item list of possible “negotiation items.”<sup>80</sup> Ms. Gattung responded with comments the following day.<sup>81</sup> Ms. Morehouse, who was traveling out of state, responded with her comments on Friday, July 10.<sup>82</sup> Her comments included a list of six comments specifically linked to identified pages in Agile’s proposal, and included asking for an updated GANTT chart (“[i]t is off by a year”), adjusting Agile’s helpdesk hours, and clarifying that DOT&PF would have to approve a data migration plan.<sup>83</sup>

In addition to these six items, Ms. Morehouse also questioned the hosting costs identified in Agile’s cost proposal, noting that these costs were significantly higher than the cost of hosting at a State facility, and stating: “we would like to negotiate them renting ETS floor space instead of [hosting] at Agile’s facility.”<sup>84</sup> Finally, Ms. Morehouse also asked whether Agile could restructure its cost proposal to distribute the fees proportionately across the three systems, rather than dividing the total cost by three.<sup>85</sup>

#### **H. July 13, 2015 Decision to Seek Best and Final Offers**

Upon reviewing Ms. Morehouse’s email, the procurement officer determined that the issues in Ms. Morehouse’s email were outside the permissible scope of “negotiations.” In an email sent Monday, July 13, Ms. Gattung wrote that Ms. Morehouse’s email was “suggesting a change to AgileAssets’ cost structure.”<sup>86</sup> She continued: “This would fall under Discussions in 2 AAC 12.290 whereby both parties are allowed the same information & ability to submit a best

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<sup>78</sup> R. 2685. The email attached a sample “Negotiation Issues” document from another RFP.

<sup>79</sup> R. 2704-2710.

<sup>80</sup> Exhibit 1.

<sup>81</sup> Exhibit 2.

<sup>82</sup> R. 2707.

<sup>83</sup> R. 2707.

<sup>84</sup> R. 2707. Because the RFP contemplated that the asset management systems would be internet-based, a threshold issue for each offeror was to identify whether their database would be hosted at an external facility, or in a rented State facility – referred to as “ETS” space because it is owned and managed by the Department of Administration’s Division of Enterprise Technology Services. R. 1536. DTS elected State hosting, and Agile elected vendor-provided hosting. As discussed further below, a question arose as to whether the offerors had accurate information about the State hosting option.

<sup>85</sup> R. 2707. This change was significant to Ms. Morehouse because of the different funding streams for the different systems, and the varying levels of complexity between the three systems. R. 2707; Morehouse testimony.

<sup>86</sup> R. 2711.

& final offer.”<sup>87</sup> Ms. Gattung’s email included the text of 2 AAC 12.315, “Contract Negotiations,” highlighting the section indicating that changes made to the proposal during negotiations “may not have the effect of changing the ranking of the highest ranked proposal.”<sup>88</sup>

Ms. Gattung also pasted into the email the full text of 2 AAC 12.290, “Proposal Discussions with Individual Offerors,” with the following sections highlighted:

The opportunity for confidential discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award.<sup>89</sup>

Following discussions, the procurement officer may set a date and time for the submission of best and final proposals.”<sup>90</sup>

The evaluation of a proposal may be adjusted as a result of a discussion under this section. The conditions, terms, or price of the proposal may be altered or otherwise changed during the course of the discussions provided the changes are within the scope of the requests for proposals. After best and final proposals are received, final evaluations will be conducted as described in 2 AAC 12.260.<sup>91</sup>

The procurement officer suggested that the group discuss these issues at an already planned meeting later that afternoon.<sup>92</sup> In a separate email minutes later, the procurement officer sent the group an email with a revised version of the “negotiation items” list, now including the items from Ms. Morehouse’s January 10 email.<sup>93</sup>

Ultimately, the decision was made that day to halt the negotiation preparations, and instead pursue discussions with both offerors. That afternoon, the procurement officer emailed both offerors to schedule discussions, and informed each offeror that best and final offers would be solicited.<sup>94</sup> In short, although DOT&PF had been engaged in preliminary preparations to begin negotiations with Agile based on the outcome of the June 2015 PEC meeting, those negotiations did not actually begin at that time. Rather, once the procurement officer determined that topics being discussed internally implicated a need for discussions under 2 AAC 12.290, DOT&PF halted its internal preparations for negotiations with Agile.<sup>95</sup>

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<sup>87</sup> R. 2711.

<sup>88</sup> R. 2711.

<sup>89</sup> 2 AAC 12.290(a).

<sup>90</sup> 2 AAC 12.290(c).

<sup>91</sup> 2 AAC 12.290(d).

<sup>92</sup> R. 5823.

<sup>93</sup> R. 5823-5827.

<sup>94</sup> See R. 2715-2717, 2944, 2947-2948, 2963.

<sup>95</sup> Gattung testimony; Kotyk testimony; R. 2711. During this same period of time, one other issue arose that requires mentioning here. On July 10, 2015, DOT&PF State Equipment Fleet Manager Diana Rotkis sent an internal email to several other DOT&PF employees in which she made an offhand comment that her section would not accept DTS as a substitute if negotiations with Agile were unsuccessful. In an email largely about other topics,

## I. Discussions with Offerors

Discussion teleconferences were scheduled with each offeror for July 16, 2015. DOT&PF was represented at these discussions by the procurement officer, Mr. Kotyk, Ms. Morehouse, and Todd Hanley from DOT&PF's Statewide Maintenance and Operations section.<sup>96</sup> Ms. Gattung's calendaring request to the DOT&PF participants for the DTS teleconference referenced "Discussion of their Cost Proposal, Section 2" (the section that identified hosting costs); her calendaring request for the Agile teleconference similarly referenced "Cost of Hosting."<sup>97</sup>

In the course of preparing for these discussion meetings, Mr. Kotyk identified a related issue that became central to the discussions.<sup>98</sup> Amendment 7 to the RFP had identified the rental cost for State-provided hosting as "\$9,000."<sup>99</sup> No offeror had questioned this cost, and the one offeror which had elected to proceed with state hosting – DTS – had interpreted the amount listed as a monthly cost. In fact, the \$9,000 was the *annual* cost. Mr. Kotyk brought this issue to the attention of the procurement officer, who determined that discussions with both offerors needed to include ensuring "that everyone understood the ETS cost."<sup>100</sup>

At the time the decision was made to enter into discussions, Mr. Kotyk felt "pretty familiar with both proposals and what [he] was thinking about from an IT perspective."<sup>101</sup> Ms. Gattung and Mr. Kotyk discussed the scope of discussion topics prior to the meeting with DTS, and intended to focus the discussions on the hosting costs issue.<sup>102</sup> The procurement officer

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Ms. Rotkis wrote: "Just as an FYI, if the first company fails in any way to negotiate we will not be going with the next bidder. They did not meet the criteria for having an EMS system." The same day that she sent the email, Ms. Rotkis also expressed the same views in a conversation with Ms. Gattung, who was not a recipient on the email. Ms. Gattung was surprised by Ms. Rotkis's statement because Ms. Rotkis lacks authority to pull her section out of the RFP. Given Ms. Rotkis's lack of authority to impact the RFP, Ms. Gattung did not take any action based on Ms. Rotkis's statements. Mr. Kotyk, who was cc-ed on Ms. Rotkis's July 10 email, forwarded the email to Ms. Gattung. Ms. Gattung responded to Mr. Kotyk that Ms. Rotkis had made a similar statement to her, but that she "wasn't going to cross that bridge until we had to." Knowing that Ms. Rotkis lacked the authority to take any action vis-à-vis her section's participation in the RFP, Ms. Gattung made the decision to ignore Ms. Rotkis's ill-advised commentary unless and until it became necessary to address it further. R. 5324-5326; Gattung testimony. Neither Ms. Gattung nor any other member of the PEC was influenced by Ms. Rotkis's view of DTS's capabilities.

<sup>96</sup> R. 2934-2939, 2940, 2945, 5330-5335, 5338. Mr. Hanley, "a maintenance expert," to serve as project manager in light of Mr. Coffey's own travel plans. R. 5308. Neither Mr. Hanley nor Mr. Coffey testified at the hearing.

<sup>97</sup> R. 2942, 2945.

<sup>98</sup> R. 2940.

<sup>99</sup> R. 1586.

<sup>100</sup> Gattung testimony; R. 2940-2941.

<sup>101</sup> Kotyk testimony.

<sup>102</sup> R. 5338.

provided Mr. Hanley with a copy of DTS’s original proposal and its response to Amendment 5 on July 13, the day she determined that discussions needed to occur.<sup>103</sup>

Each teleconference was scheduled for 90 minutes, but neither lasted the full time.<sup>104</sup> The discussion with DTS addressed two topics: the hosting cost issue, and also a question about the nature of the software license DTS was proposing.<sup>105</sup>

The discussion with Agile addressed additional topics, including: the need to update Agile’s GANTT chart with current dates; the need for software source code to be placed in escrow; whether Agile’s cost proposal could distribute fees across the three systems proportionally, rather than just dividing the fees by three; the timing of helpdesk availability; hardware replacement during the lifecycle of the contract; questions about data migration; and the fact that Agile had proposed changes to the State’s standard contract language.<sup>106</sup> These are items that were included on the “negotiation items” working list before the decision was made to proceed with discussions with both offerors, rather than negotiations with one.<sup>107</sup> And in most if not all cases, these items were not issues of concern in DTS’s proposal.<sup>108</sup>

Both Ms. Gattung and Mr. Kotyk described the hosting issues – making sure that both offerors understood what was available in the State hosting option and its actual cost – as the most significant substantive issue raised in discussions.<sup>109</sup> Following both discussions, the procurement officer emailed each offeror an identical email, which began:

Thank you for meeting with us today! As we stated, the purpose of our discussion was to ensure your understanding of the hosting requirements and also to ensure you have access to the hosting site and are well informed of all costs.<sup>110</sup>

The email provided the offerors with contact information for ETS’s State Data Center Manager, Chris White, should offerors need further information about the State-provided hosting option. The email also provided the full text of 2 AAC 12.290, “Proposal Discussions with Individual Offerors,” asked the offerors to “please submit your proposal modifications in writing” pursuant

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<sup>103</sup> R. 2934.

<sup>104</sup> The Agile discussion was scheduled to begin at 10:30, and was over by 11:45. *See* R. 5330, 5338. The DTS discussion was scheduled for 1:30, and was over by 2:25, if not 2:05. *See* R. 2945, 2946, 5338, 5351.

<sup>105</sup> R. 2947, 3168.

<sup>106</sup> *See* R. 2981-2983, 3059. On the topic of changes to the contract language, that discussion was limited to an acknowledgement that proposed changes would have to be negotiated at a later date if Agile were selected. R.2985; Kotyk testimony.

<sup>107</sup> *See* R. 2932-2933.

<sup>108</sup> Kotyk testimony.

<sup>109</sup> Gattung testimony; Kotyk testimony.

<sup>110</sup> R. 5351.

to 2 AAC 12.290(b), informed offerors they would be provided with “written notice of the date and time for the submission of your best and final offer,” and encouraged offerors to contact her with questions.<sup>111</sup>

Following the July 16 discussions, both offerors separately communicated with ETS and with Ms. Gattung with questions about the ETS hosting option.<sup>112</sup> The procurement officer also communicated with ETS, asking clarifying questions and ensuring communication between ETS and both offerors.<sup>113</sup>

#### **J. Best and Final Offers**

On Tuesday, July 28, 2015, the procurement officer notified both offerors that “written modifications to your proposal resulting from our discussions” would be due on Friday, July 31, 2015.<sup>114</sup> The following day, the procurement officer extended the deadline to Monday, August 3, 2015.<sup>115</sup>

DTS submitted its BAFO response on July 29, 2015.<sup>116</sup> DTS submitted a letter reducing to writing the two items “clarified” during discussions – the nature of DTS’s proposed license (perpetual) and a clarification regarding hosting costs (namely, that DTS had overestimated these costs significantly, and that clarifying this would significantly reduce its cost proposal).<sup>117</sup> DTS did not submit a revised technical proposal, but submitted a Cost Proposal BAFO lowering its proposed cost to \$5,846,074.24.<sup>118</sup> DTS also clarified that its listed “hardware costs include both initial costs and refresh needs (after 5 years)[.]”<sup>119</sup>

Agile submitted its BAFO on August 3, 2015.<sup>120</sup> Agile’s BAFO identified six discussion topics being “reduced to writing” by the BAFO: distribution of fees across business areas; the RFP’s source code escrow requirement; vendor-managed hosting at a state facility (an option

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<sup>111</sup> R. 5351-5354.

<sup>112</sup> R. 2963, 2965-2967; Ibaugh testimony (“In the RFP process, we had information about what the hosting cost was, but we had incorrect information, so this, and the discussion we had with Christopher White, helped us understand really what the hosting cost was at the State and allowed us to change our cost proposal based on what he was able to tell us about the State hosting facility”).

<sup>113</sup> See R. 2964, 2968.

<sup>114</sup> R. 2970-2971.

<sup>115</sup> R. 2974-2975. The deadline was extended as a courtesy to Agile because Mr. Garvey was travelling when the procurement officer sent the July 28 email. R. 5455; Gattung testimony.

<sup>116</sup> R. 2947-2962. DTS had previously submitted an email to the procurement officer shortly after the July 16 discussion to address the licensing issue that had been raised in that discussion. R. 2946.

<sup>117</sup> R. 2949-2950.

<sup>118</sup> R. 2947-2762, 2978.

<sup>119</sup> R. 2950.

<sup>120</sup> R. 2979-3000; 3003-3026.



Agile rejected); warranty of vendor-provided hardware and hardware refresh; help desk support hours; and Agile’s requested changes to DOT’s standard contract language.<sup>121</sup> Agile’s revised cost proposal was for \$8,372,266.<sup>122</sup>

**K. Evaluation of BAFOs**

1. PEC Scoring of Agile’s BAFO

On Thursday, August 6, 2015, the procurement officer asked the PEC members to rescore Agile’s proposal, stating: “Agile included a few more items in their BAFO that need to be considered by the PEC in their written evaluation.”<sup>123</sup>

In an internal email the following Monday, Mr. Kotyk expressed confusion about a statement in Agile’s BAFO – namely, in the section of the BAFO about hosting options, Agile stated that it had “adjusted our technical environment to a more appropriately sized solution.”<sup>124</sup> That day (August 10, 2015), the procurement officer emailed Agile asking for clarification:

Please further explain or elaborate on your response to No. 3 on page 5. The hosting solution you will be using is not clear. Also, please explain paragraph 3. Per Amendment 5, Attachment C, proposals must describe the Offeror’s approach to Task 6.<sup>125</sup>

All of these items referenced – the “response to No. 3” and the “approach to Task 6” – concerned the nature of the hosting solution. Agile’s August 13, 2015 response (1) confirmed Agile had not changed its approach to hosting, which was to use vendor-provided hosting, (2) explained that Agile’s BAFO reflected its determination that it could provide that hosting in a more cost-efficient manner than described in its original cost proposal, and (3) documented where the remaining information being inquired about was also provided in Agile’s original proposal.<sup>126</sup>

Following the clarification from Agile, each PEC member rescored Agile’s proposal, as revised by its BAFO.<sup>127</sup> The PEC then met on August 18, 2015.<sup>128</sup> The only PEC member to change his scoring as a result of the BAFO was Mr. Kotyk, who awarded Agile an additional

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<sup>121</sup> R. 3543.

<sup>122</sup> R. 3560.

<sup>123</sup> R. 3028.

<sup>124</sup> R. 3030.

<sup>125</sup> R. 5464.

<sup>126</sup> R. 5467.

<sup>127</sup> See R. 3033-3042.

<sup>128</sup> Gattung testimony; Kotyk testimony. After the meeting, the PEC members emailed their score sheets back to the procurement officer. R. 3-44. Some of the revised score sheets are dated after the 18<sup>th</sup>, but email correspondence reflects that the actual revisions were made before that date. The later confirming emails were sent after the procurement officer asked PEC members to re-date and re-submit their score sheets. See R. 5475-5504.

five points in category 7.03 (“solution meets requirements”), raising his score in that category from 235/350 to 240/350.<sup>129</sup> Mr. Potter and Mr. Bylsma did not change their scores.<sup>130</sup>

Although one PEC member had raised his score slightly (5 out of 1000 points), the overall scoring of Agile’s proposal went down as a result of the BAFOs. This was because the price changes in each offeror’s BAFO had the result of lowering the cost points awarded to Agile from 251 to 209.5. As a result, Mr. Bylsma’s overall score for Agile went from 824.5 to 783; Mr. Kotyk’s overall score for Agile went from 737.5 to 701; Mr. Potter’s overall score for Agile went from 744.5 to 703; and Agile’s average score went from 768.83 to 729.

## 2. PEC Consideration of DTS’s post-BAFO submission

Also on August 18, 2015, the procurement officer exchanged emails with DTS owner Allen Ibaugh regarding an item that had been raised internally after DTS’s submission of its BAFO.<sup>131</sup> Specifically, noting that DTS’s response to Amendment 5 referenced “some third party software alternatives,” the procurement officer asked whether DTS’s cost proposal included “all costs associated with these alternatives.”<sup>132</sup>

Via email later that day, Mr. Ibaugh responded that improvements to DTS’s own VUEWorks software “since [DTS] responded to this RFP” had now obviated the need to use third party software:

I went over this with our technical team and there is good news. Much of this functionality has been built out since we responded to this RFP in our Advanced Inventory & Equipment, Resources Manager, and Facilities Modules . . . . So in sum – these costs are covered and can now be handled with the VUEWorks product, without the need for a 3<sup>rd</sup> party alternative.<sup>133</sup>

The procurement officer forwarded Mr. Ibaugh’s email to the PEC with a description of how this new information had arisen, noting that the specific questions regarding third-party

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<sup>129</sup> R. 17-30. Mr. Kotyk increased his score because he was impressed by Agile’s depth of treatment of the issue of software source code escrow. Source code escrow was a discussion topic with Agile – it was not a discussion topic with DTS because DTS’s proposal already provided for source code escrow. Mr. Kotyk felt that Agile’s treatment of source code escrow in its BAFO was impressive, in depth, and above and beyond what was requested. Kotyk testimony.

<sup>130</sup> R. 3-16, 31-44.

<sup>131</sup> R. 3044-3045.

<sup>132</sup> R. 5476. In fact, dozens of DTS’s responses to system requirements for EMS consisted of acknowledging the requirement, but then stated that third-party software would be required to meet the identified need. *See* R. 2842-2843, 2847-2849, 2854 (Proposers response to requirement: “understand and suggest an alternative requirement development or 3rd party application such as Springbrook”).

<sup>133</sup> R. 3044; Ibaugh testimony. Mr. Ibaugh’s email also asked “for clarification” about several other items in the RFP. R. 3044.

software “were not presented to DTS during discussions, but were approached as clarification after their BAFO was submitted.” The procurement officer then queried the PEC members as to whether the clarification impacted their scoring of DTS’s proposal, asking: “Do you feel this additional information would change your technical scoring of DTS? If so, would the change in scoring be significant?”<sup>134</sup>

Each PEC member responded separately that the new information received did not change his scoring of DTS’s technical proposal.<sup>135</sup> Mr. Kotyk responded first, indicating that he viewed the changes as carrying both positives and negatives, and that, on balance, the new information did not significantly change his scoring:

This additional information does not significantly change my scoring. I think that the required functionality directly in VUEWorks instead of having to rely on integration with 3<sup>rd</sup> party products is good, but that is balanced by their statement that this is new functionality which hasn’t been used [with] other customers for an extended period of time.<sup>136</sup>

Mr. Kotyk’s assessment of the situation was “a judgment determination based on [his] knowledge of software testing and experience with that.”<sup>137</sup> Mr. Potter responded that his view was consistent with Mr. Kotyk’s. He wrote: “With Chris’s overview. Still the same. No change. Thanks.”<sup>138</sup> Mr. Bylsma also responded that the information did not change his score: “I’m fine with leaving the score the same. Agree [with] what Chris said, advantage and disadvantage balance each other out.”<sup>139</sup> Like Mr. Kotyk, Mr. Bylsma felt that these software changes were simply too new, having not been addressed by DTS in either the proposals or the live demos.<sup>140</sup>

#### **L. Negotiations After Final Evaluation**

With both BAFOs now having been evaluated by the PEC, the scoring still favored Agile, though at a lesser margin than before BAFOs, with Agile’s average score at 729 points, and DTS’s average score at 681.83 points.<sup>141</sup>

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<sup>134</sup> R. 3046-3048.

<sup>135</sup> R. 3052-3054.

<sup>136</sup> R. 3052.

<sup>137</sup> Kotyk testimony.

<sup>138</sup> R. 3053.

<sup>139</sup> R. 3054.

<sup>140</sup> Bylsma testimony (“It was certainly something that was not offered as a part of the original solution . . . . To me that indicated it was something they had not done. If it was something they had done they would have indicated so in the proposal or in the demos”).

<sup>141</sup> R. 45.

On August 24, 2015, the procurement officer notified Mr. Coffey and Ms. Morehouse that Agile had the highest scoring proposal.<sup>142</sup> She proposed negotiating the issue of Agile’s requested changes in the State’s contract language as soon as possible, and prior to issuing a Notice of Intent to Award.<sup>143</sup>

On September 2, 2015, the procurement officer sent Agile representative Joe Garvey an email titled “Discussion points not included in BAFO.”<sup>144</sup> The email asked Mr. Garvey to “please confirm” four relatively minor items that apparently came up during the July 16 discussions, but were not made part of Agile’s BAFO. These were: the need to update dates on Agile’s GANTT chart, a request related to using the correct “CDS route number,” and questions about whether data migration plans referenced in Agile’s proposal would be submitted to DOT&PF for approval. Agile responded affirmatively on September 4, 2015.<sup>145</sup>

During September and October 2015, DOT&PF and Agile negotiated over various issues related to two attachments to Agile’s technical proposal – Attachment N (“AgileAssets Software License and Services Agreement”) and Attachment Q (“Requested Changes to the State’s Terms and Conditions”).<sup>146</sup> Eventually, agreements were reached as to the language of the software license, services agreements, and other contractual matters.

On October 26, 2015, the procurement officer issued a Notice of Intent to Award a Contract, identifying Agile as having submitted the most advantageous offer.<sup>147</sup>

#### **M. Creation of Back-Dated Memorandum**

As discussed further below, DTS filed its protest on November 3, 2015, and this appeal on December 4, 2015. Shortly after the appeal was filed, the Commissioner of Administration granted the procurement officer a 30-day extension of time to submit DOT&PF’s AS 36.30.605 protest report. After the extension was granted, and before the protest report was submitted to the Commissioner, Ms. Gattung generated a document and inserted it into the procurement file. The document is a memorandum dated May 15, 2015, and titled “Best interest of the state.”<sup>148</sup>

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<sup>142</sup> R. 1.

<sup>143</sup> R. 1. Although Mr. Ibaugh testified he was unaware of the ability to disagree with the State’s standard contract language, Section 3.04 of the RFP expressly allowed offerors to propose changes to those terms and conditions. *See* R. 68.

<sup>144</sup> R. 3059.

<sup>145</sup> R. 5545-5546.

<sup>146</sup> R. 1743, 2062-2076, 2163-2173; R. 5553-5556, 5562-5670, 5672-5674, 5588, 5635, 5641-5646.

<sup>147</sup> R. 3074.

<sup>148</sup> R. 2207.

On its face, the memorandum purports to be a finding by the procurement officer, dated May 15, 2015, that the interests of the state are best served by streamlining the evaluation into a single meeting instead of two in light of the number of proposals received. As described above, however, evidence in the record documents that in fact, this decision was not made on May 15, 2015, but on June 4, 2015.<sup>149</sup>

In the time leading up the hearing, DTS questioned the authenticity of the memorandum, and requested and was provided an original electronic copy with metadata.<sup>150</sup> During her direct testimony, Ms. Gattung volunteered that she had indeed created the best interests document more than six months after May 15, 2015, and stated she did so to shore up the documentation in the procurement file in the event that the file was later audited.<sup>151</sup> Ms. Gattung denied creating the document in response to DTS's filing a protest and appeal, and contends that her sole motivation in creating the memorandum was to document the approximate time at which a decision had actually been made in the event that the file was later audited.

This testimony is not credible. DTS raised in its November 3 protest and its December 4 appeal the failure to follow the two-phased approach identified in the RFP. Ms. Gattung created the back-dated memorandum 18 days after the appeal was filed, and less than two weeks after requesting from the Commissioner an extension for filing the protest report. Most troubling is that in the Protest Report she signed barely two weeks after creating the back-dated memo, Ms. Gattung falsely represented the memorandum as actually having been issued in May – a misrepresentation that belies her later testimony that the memo's creation was simple file housekeeping unrelated to the appeal.<sup>152</sup>

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<sup>149</sup> See R. 2191 (May 15, 2015 memo to PEC, describing phased evaluation process), 4936 (June 4, 2015 email to PEC proposing elimination of phased evaluation process).

<sup>150</sup> DTS made this request on February 16, 2016, amidst numerous other document requests. That day, counsel for DOT&PF reiterated that the procurement officer was out of town until the end of February and that he had provided the records available to him, and attempted to answer some of the many document requests based on the available record. See DTS Response to Protest Report, Ex. 1-2. In a status hearing on February 23, 2016, counsel stated he was working on obtaining the requested metadata – again, one of many document requests from DTS. The following day, DTS filed a notice that it was “withdrawing” its hearing request and seeking a decision on the written record, and withdrawing its request for electronic documents. DTS later withdrew its withdrawal, and DOT&PF provided the electronic document on March 1, 2016. Metadata in the electronic document shows a creation date of December 22, 2015.

<sup>151</sup> Gattung testimony (“I knew that the [June 4] email was in there and I knew that we had talked about [removing the phased PEC process], and I felt like the record needed to reflect that, in the event – all of our files are subject to audit by the State of Alaska – so I felt that that email needed to be documented and I felt that I should put a written determination in”).

<sup>152</sup> Protest Report, p. 4.

Ultimately, for reasons discussed further below, the decision to eliminate the two-phased evaluation approach is judged to be wholly reasonable. However, and although it has no impact on the outcome of this dispute, the insertion of a back-dated memorandum into a procurement file without appropriate documentation – e.g. identifying the creation date and clearly specifying the retroactive intent – is unacceptable. Equally unacceptable is the misrepresentation of this document and its history in the protest report submitted to the Commissioner.

## **N. General Findings**

Upon review of the record evidence and testimony presented, I summarize my general factual findings about this procurement as follows:

1. All three members of the PEC team scored the proposals based on their independent judgment and personal areas of expertise, and appropriately exercised independent judgment in evaluating both proposals.
2. The testimony of Mr. Kotyk and Mr. Bylsma was particularly persuasive.
3. DTS’s proffered metadata expert was not persuasive and his testimony was not helpful in determining any issue in dispute in this case.
4. Ms. Gattung’s creation of a back-dated document after the appeal was filed, her placement of that document in the procurement file, and her misleading statement about the document in the protest report are troubling, and necessarily affect her credibility. While I do not find her testimony in this matter entirely lacking in credibility, I rely on her testimony only when also supported by other evidence. That being said, I do not believe that Ms. Gattung acted improperly during the course of the procurement itself. I do not find that she was motivated by a preference for one offeror over the other, or that she took actions intending to prejudice one offeror or the other. The record evidence shows a genuine desire to follow the rules of the procurement process – for example, in making the decision to return to discussions rather than negotiations when cost issues were raised.
5. The decision to move from pre-negotiations to 2 AAC 12.290 discussions, the subsequent solicitation of BAFOs, and the evaluation of the offerors’ technical changes by the PEC were undertaken in good faith.
6. The decision to award the contract to Agile was not made until after negotiations were complete.

## **III. Procedural History**

DOT&PF issued the Notice of Intent to Award on October 26, 2015.<sup>153</sup> In the days that followed, Mr. Ibaugh exchanged emails with the procurement officer about the basis for the decision and the process for contesting it.<sup>154</sup> DTS timely filed its protest on November 3,

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<sup>153</sup> R. 3072.

<sup>154</sup> R. 3075-3082.

2015.<sup>155</sup> DTS’s protest originally categorized its objections as comprising four broad categories of concerns:

- Factual inaccuracies in the state’s scoring analysis;
- Incorrect scoring in the state’s analysis;
- Factual error in the state’s statistical probability analysis (essentially, a claim that two evaluators had such similar scores that they must have copied one another);
- Factual and legal error in the state’s evaluation process.

Although DTS identified numerous separate alleged errors in the evaluation process, none of these included the scope of discussions with the two offerors.

The procurement officer denied DTS’s protest on November 24, 2015.<sup>156</sup> DTS timely filed its appeal on December 4, 2015. DTS’s appeal incorporated the issues raised in the protest, and identified the “issues on appeal” as follows:

- The objective facts do not support the subjective judgments set forth in the evaluations;
- The decisions to reduce the cost factor, reduce the size of the PEC and change the RFP evaluation scheme were “not rationally based”; and
- “The procurement officer failed to address over two dozen other grounds for protest submitted by DTS. Her deemed denial of those protest grounds is not reasonably based and is arbitrary and capricious.”<sup>157</sup>

After an extension granted by the Commissioner of Administration, DOT&PF filed its AS 36.30.605 report on January 13, 2016. The protest report was accompanied by 398 pages of agency records. At a status conference on January 20, 2016, DOT&PF indicated it would supplement the agency record by January 29, 2016. On January 29, 2016, DOT&PF produced a 4,786-page record.

On February 2, 2016, DTS filed a motion to stay the award. DOT&PF opposed the motion, arguing both that there was no legal authority to enter a stay, and that a stay would be detrimental to state interests. DTS’s motion for stay was denied.<sup>158</sup> As of the date of the hearing, however, DOT&PF had not yet formally awarded the contract to Agile.<sup>159</sup>

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<sup>155</sup> R. 3083-3115.

<sup>156</sup> R. 3117-3148.

<sup>157</sup> Appeal, p. 3.

<sup>158</sup> Although the motion was denied, DOT&PF was cautioned that “an agency that proceeds with an award in the face of a potentially valid protest assumes the risk that the award may be cancelled.” Order Denying Motion to Stay, at 4 (Feb. 5, 2016), citing *In re Aetna Life Insurance*, OAH No. 06-0230-PRO, Final Decision and Order, May 25, 2006, at 40 (“the division must live with the consequences of its own decisions” to deny a stay).

<sup>159</sup> March 7, 2016 email from Assistant Attorney General Welsh.

In the meantime, after two requested extensions, DTS filed its response to the protest report on February 19, 2016. DTS's response to the protest report "incorporated by reference" all issues previously raised in its appeal, and also added several new issues it claimed arose as a result of the recently-received records. The bulk of the discussion of new issues concerned a claim that DOT&PF had improperly negotiated with Agile during the discussion phase, prior to the receipt of BAFOs.<sup>160</sup> In the course of this argument, DTS claimed that it was prejudiced by these alleged negotiations because the discussions with DTS were not comparable to the "negotiations" with Agile.<sup>161</sup> This was the first time DTS raised an issue as to unequal discussions.

On February 24, 2016, one day after a lengthy status conference about discovery issues, DTS filed a "Notice" that it was withdrawing its request for a hearing and instead seeking "summary adjudication," and asking the administrative law judge to close the record and preclude DOT&PF from further supplementing the record or providing testimony on any issues. After a status conference at which the administrative law judge informed DTS that she would not close the record and at which DTS clarified that its request was really a request for a decision on the written record, the administrative law judge declined to decide the matter solely on the written record, and DTS withdrew its request for summary adjudication. DOT&PF subsequently supplemented the record with additional documents and the requested metadata.

A two-day evidentiary hearing was held on March 8-9, 2016. Both parties were represented by counsel. Rebecca Gattung, Brad Bylsma, Steve Potter, Chris Kotyk, Allen Ibaugh, Carolyn Morehouse, and Diana Rotkis testified.<sup>162</sup> The 5,781-page administrative record was admitted into evidence, along with hearing exhibits 1-3. Following submission of post-hearing briefs and oral argument by counsel, the matter was taken under advisement.

#### **IV. General Legal Principles**

Procurement rules "prevent fraud, collusion, favoritism, and improvidence in the administration of business," and "insure that the [state] receives the best work or supplies at the

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<sup>160</sup> Response to Protest Report, pp. 2-9.

<sup>161</sup> Response to Protest Report, p. 2 ("the agency's purported discussions with DTS were, at best, unequal, and at worst a façade for entering into negotiations with Agile Assets prior to the receipt of BAFOs"), p. 9.

<sup>162</sup> DTS also offered the testimony of Steven LaPha, a computer consultant, in an attempt to address whether documents in the record were created on dates other than the date listed on the document. Mr. LaPha's testimony was too disorganized and disjointed to be of any assistance in deciding this matter. It did not appear that he had the correct documents in front of him and, if he did, he was unable to access them or to meaningfully describe their content. I did not find his testimony useful, and awarded it no weight in reaching my conclusions.



most reasonable prices practicable.”<sup>163</sup> The Alaska Supreme Court requires that competitive procurement be conducted with “fairness, certainty, publicity, and absolute impartiality,” and notes that courts will guard “against the award of a public contract to a bidder who has received an unfair competitive advantage.”<sup>164</sup> However, “[t]he requirement of public bidding is for the benefit of property holders and taxpayers, and not for the benefit of the bidders; and such requirements should be construed with the primary purpose of best advancing the public interest.”<sup>165</sup>

A procurement protest must establish that “legal or factual errors” occurred in the procurement that amount to deficiencies serious enough to warrant a remedy.<sup>166</sup> If an alleged violation of procurement procedures is not material, then the procedural deviations may not warrant sustaining the protest.<sup>167</sup> “In general, for a protest to be sustained the protestor must demonstrate prejudice from the error. There is no need to show conclusively that but for the error the protestor would have been selected; it is enough that the protestor would have been competitive and has been deprived of ‘a reasonable chance of receiving an award.’”<sup>168</sup> DTS bears the burden of proving violations – and prejudice – by a preponderance of the evidence.<sup>169</sup>

The administrative law judge reviews this matter under a delegation from the commissioner.<sup>170</sup> The procurement code authorizes the commissioner to “audit and monitor the implementation of the [procurement] regulations and the requirements of [the Code] with respect to using agencies.” “The commissioner or his delegee applies independent judgment as to questions of law, and determines questions of fact *de novo*,” granting some deference to discretionary decisions by the procurement officer within the limits of the law.<sup>171</sup>

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<sup>163</sup> *McBirney & Associates v. State*, 753 P.2d 1132, 1135 -1136 (Alaska 1988) (quoting *Gostovich v. City of West Richland*, 452 P.2d 737, 740 (Wash. 1969)).

<sup>164</sup> *McBirney & Assoc. v. State*, 753 P.2d 1132, 1136 (Alaska 1988) (quoting prior authority).

<sup>165</sup> *Id.*

<sup>166</sup> AS 36.30.590(b)(2); 36.30.585(b).

<sup>167</sup> *Cf.*, e.g., *Quality Sales Foodservice v. Dep’t of Corrections*, OAH No. 06-0400-PRO at 14 (Commissioner of Administration 2006) (minor variance from bid specification was not material because it did not affect outcome); *Chris Berg, Inc. v. State, Dep’t of Transp.*, 680 P.2d 93, 94 (Alaska 1984) (variance is material if it gives one bidder “a substantial advantage over other bidders and thereby restricts or stifles competition”).

<sup>168</sup> *Aetna Life Insurance*, at 29 (quoting *DBA Systems, Inc.*, B-224306, 86-2 Comptroller General Decisions, 722 (1986)).

<sup>169</sup> 2 AAC 64.290(e).

<sup>170</sup> AS 36.30.040(a).

<sup>171</sup> *Aetna Life Ins.*, at 28; *see also, Lakloey, Inc. v. University of Alaska*, 141 P.3d 317, 321 (Alaska 2006); *Olson v. State of Alaska*, 799 P.2d 289, 293 (Alaska 1990) (discretionary acts of state officials reviewed for abuse of discretion).

## V. Discussion

DTS has raised numerous factual and legal claims about various steps of the procurement process. DTS also abandoned numerous claims – including the bulk of those raised in its November 3 protest and its December 4 appeal – in the time leading up to and during the hearing. Its remaining claims are discussed below, organized chronologically.

### A. Claims About the Elimination of the Two-Phased Evaluation

DTS protests DOT&PF's change from a two-phased evaluation to a single PEC meeting being held after both written proposals and product demonstrations.<sup>172</sup> DTS argues that the decision to conduct live demonstrations before the evaluation of proposals was “not rational.”<sup>173</sup> Undoubtedly, this issue was muddied by the procurement officer's ill-conceived decision to place a backdated memorandum into the procurement file, and her misleading written statements about that memorandum. However, evidence in the record amply supports conducting a single PEC meeting after demonstrations. The two-phased process was directly linked to the presumed need to narrow the field of offerors before conducting live demonstrations in remote areas. The receipt of only two responsive proposals obviated that need.

DTS's prehearing submissions argued that the change “was prejudicial to DTS because there were evaluation comments indicating that evaluators relied upon Agile Asset[s] demonstration in scoring its written proposal, apparently because the written proposal was silent or deficient.”<sup>174</sup> But the citation DTS provides – R. 35 – is to Mr. Bylsma's revised score sheet *after BAFOs*.<sup>175</sup> The comment about demonstrations does not appear on Mr. Bylsma's pre-BAFO score sheet.<sup>176</sup> And the PEC members testified that they evaluated the written proposals and demonstrations separately in accordance with the evaluation sheet. Thus, the evidence does not support DTS's assertion that Mr. Bylsma or any other evaluator improperly allowed the software demonstration to sway the scoring of the written evaluation.

Further, Mr. Ibaugh conceded in his testimony that the change in process would not be unfair if applied evenly to both offerors – which it was. While the procurement officer's post-

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<sup>172</sup> Response to Protest Report, p. 11; DTS Prehearing brief, pp. 14-15.

<sup>173</sup> Response to Protest Report, p. 11.

<sup>174</sup> Response to Protest Report, p. 11 (citing R. 35).

<sup>175</sup> See R. 36.

<sup>176</sup> R. 5048.

dating of a Best Interests Determination memo was an error, the underlying decision to change the evaluation timeline occurred in June 2015, before the PEC meeting, and was not an abuse of discretion. Because the procurement officer did not abuse her discretion in determining that the evaluation could be accomplished in one PEC meeting instead of two, and DTS was not prejudiced by this change, this protest ground is denied.

**B. Claims About How PEC Members Scored DTS’s Proposal**

“In exchange for a bidder’s investment of the time and resources involved in bid preparation, a government agency must be held to an implied promise to consider bids honestly and fairly.”<sup>177</sup> At the same time, however, it is axiomatic that “[s]coring proposals is an inherently subjective and variable exercise.”<sup>178</sup> This is particularly so when scoring complex proposals.<sup>179</sup> Where a protestor objects that the evaluators’ scores are unreasonable, the question on appeal is “whether the record discloses the basis for the evaluators’ ratings and adequately demonstrates that they considered all of the important factors [as identified in the request for proposals].”<sup>180</sup> An evaluation is reasonable “if the objective facts . . . reasonably support [the] evaluation.”<sup>181</sup>

1. DTS Abandoned its “Inferred Scoring” Claim.

The lion’s share of DTS’s initial protest was devoted to an argument that the evaluators’ scores should be recalculated using what DTS called an “inferred scoring analysis” – basically, a process by which DTS had attempted to assign fixed numerical values to various notations and adjectives used by evaluators, and then apply that fixed numerical value each time the evaluator used the given adjective or notation. DOT&PF objected to DTS’s “inferred scoring” approach as “hokum,” and “nothing more than rank speculation.”<sup>182</sup> Midway through the evidentiary hearing, DTS formally abandoned its arguments about “inferred” scores. To the extent to which

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<sup>177</sup> *King v. Alaska State Housing Authority*, 633 P.2d 256 (Alaska 1981).

<sup>178</sup> *Global Positioning Services Inc. v. Department of Natural Resources*, OAH 12-0083-PRO (Commissioner of Administration) at p. 14.

<sup>179</sup> *See Aetna Life Insurance*, at 28 (“Scoring complex service proposals is partly subjective. Individual raters vary widely in the numbers they assign to the same proposal”).

<sup>180</sup> *In Re World Wide Movers, Inc.*, at 10, citing *King v. Alaska Housing Authority*, 633 P.2d 256, 263 (Alaska 1981); *State, Department of Education v. Nickerson*, 711 P.2d 1165, 1169 (Alaska 1985); *Lower Kuskokwim School District v. Foundation Services, Inc.*, 909 P.2d 1283, 1388-89 (Alaska 1996).

<sup>181</sup> *King v. Alaska State Housing Authority*, 512 P.2d 887, 894 (Alaska 1973).

<sup>182</sup> DOT&PF Pre-Hearing Brief, pp. 9-10.

DTS has raised inferred scoring in its post-hearing brief, this claim was formally waived and is therefore not considered.<sup>183</sup>

## 2. Claims About “Obliteration” of Certain Notes on PEC Members’ Score Sheets

DTS objects that in some instances PEC members’ score sheets contain scratched out notes – so scratched out as to be “obliterated,” per DTS – in addition to notations or scores that are not scratched out.<sup>184</sup> DTS indicates that it is not protesting members changing their scores during the evaluation process, but rather is protesting the use of markings that, in completely covering up the earlier notes or score, preclude inquiry into what changes were made and why.<sup>185</sup> This protest is overruled. The PEC members were not required to preserve preliminary, later-rejected thoughts about the proposals or scoring. The Procurement Code requires that members provide either numerical scoring or a narrative explanation. Each member of the PEC provided a numerical score for each category, as required. There is nothing improper in crossing out preliminary thoughts or errors during this process.

## 3. Similarities Between PEC Members’ Scores

DTS also alleges that the scores between PEC members Chris Kotyk and Steve Potter were too similar to be coincidental, and must therefore show that these raters did not exercise their independent judgment.<sup>186</sup> Both evaluators testified that they scored the proposals separately before the PEC meeting, did not share their scores with others before that meeting, and relied solely on their own judgment. “In the absence of any evidence of bias or prejudice, procurement officials are presumed to act in good faith and to exercise honest and impartial judgment. To overcome the presumption, a protestor must provide direct evidence of actual bias or prejudice, rather than speculation.”<sup>187</sup> DTS did not meet the high burden of proof necessary to show prejudice. To the contrary, the strong weight of the evidence supports a finding that each member of the PEC independently evaluated the proposals in good faith and used his independent judgment.

## 4. Allegations that Mr. Bylsma Was Biased

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<sup>183</sup> See DTS Post-Hearing Brief, p. 27.

<sup>184</sup> Protest, p. 8; Response to Protest Report, p. 13; DTS Prehearing Brief, p. 18.

<sup>185</sup> Response to Protest Report, p. 13; DTS Prehearing Brief, p. 18.

<sup>186</sup> Protest, pp. 8, 9-10; DTS Prehearing Brief, p. 19.

<sup>187</sup> *North Pacific Erectors, Inc. v. Division of Gen. Servs.*, OAH No. 11-0061-PRO at 14 (Department of Transportation and Public Facilities 2011) (citing *Bruner v. Petersen*, 944 P.2d 43, 49 (Alaska 1997); *Earth Resources v. State, Department of Revenue*, 665 P. 2d 960, 962 n. 1 (Alaska 1983)).

At hearing, DTS also alleged that Mr. Bylsma was biased. The basis for this theory seems to be that Mr. Bylsma was appointed to the committee as a replacement for – and at the behest of – his supervisor, Diana Rotkis. But both Ms. Rotkis and Mr. Bylsma testified that Ms. Rotkis did not share with Mr. Bylsma her views about either proposal or either offeror, and, to the contrary, told Mr. Bylsma that the decision was squarely his to make. Mr. Bylsma was a particularly credible witness, and I do not find that he was influenced in any way by Ms. Rotkis’s views.

5. Claim As to Overall Reasonableness of Scores

To the extent to which DTS contends that the overall scoring was unreasonable, it did not meet its burden of proof. An evaluation is reasonable ‘if the objective facts . . . reasonably support [the] evaluation.’<sup>188</sup> Upon the testimony and written evidence presented, the objective facts reasonably support the PEC’s unanimous conclusion that Agile’s proposal was superior to DTS’s.

In its post-hearing brief, DTS alleges that Mr. Bylsma’s scores were unreasonable. DTS claims that Mr. Bylsma “clear[ly] overweighted the EMS category.” First, DTS mischaracterizes the testimony. Mr. Bylsma did not say “that DTS was better on two out of three components.”<sup>189</sup> He said that DTS was better on *one* component – PMS, the smallest, least complex of the three components,<sup>190</sup> and “neutral” on MMS, but was so inferior in EMS that he genuinely did not know if could be implemented. Under the circumstances, DTS did not establish that his score on “solution meets requirements was unreasonable.” Mr. Bylsma testified credibly and in detail about the basis for his scores. DTS’s disagreements with Mr. Bylsma’s professional judgments do not render his evaluation unreasonable.

Likewise, DTS has not shown that Mr. Potter failed to evaluate the proposals or was unreasonable in doing so. Mr. Potter testified credibly that he reviewed and faithfully followed the guidelines given to him by the procurement officer, and that his judgment at the time of the evaluation was that both offerors had good systems for his purposes, but that Agile’s product was

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<sup>188</sup> *King v. Alaska State Housing Authority*, 512 P.2d 887, 894 (Alaska 1973).

<sup>189</sup> DTS Post-Hearing Brief at 28.

<sup>190</sup> The PMS system is smaller and less complex than the other systems. Morehouse testimony. The PMS is intended to be used by 6 concurrent users; MMS is intended to be used by 250 end-users, with 50 concurrent users; EMS is intended to be used by 80 concurrent users. R. 3372. In describing the relative complexity of the systems, Ms. Morehouse stated that “Pavement is much simpler than Maintenance and Fleet [Equipment] is in the middle.” R. 5824.

judged to be superior overall. Mr. Potter's scores on the written proposals were 604.5 for Agile and 577.5 for DTS – closeness in scores that is entirely consistent with Mr. Potter's testimony that he found both proposals acceptable, but that various "little things" gave Agile a slight edge in his judgment.

DTS argues that Mr. Potter's testimony is not credible because "his score for Agile was 40% higher on section 7.01" and "50% higher on section 7.02."<sup>191</sup> Both of these items were 50-point items. The total difference in Mr. Potter's score for these two items between the two offerors is 35 points out of 1000. This is consistent with his statement that Agile's proposal, which he found more comprehensible overall, had some relatively minor advantages that prevailed over DTS's proposal.

To the extent that DTS's reasonableness claim concerns the PEC members' conclusion that the August 2015 revelations about changes to DTS's perceptions of its software capabilities vis-à-vis its previous statements about third-party software, that claim is rejected. As Mr. Kotyk explained in his email and in his testimony, he did not judge this relatively recent change as a wholly positive attribute. Mr. Kotyk's assessment of the situation was "a judgment determination based on [his] knowledge of software testing and experience with that."<sup>192</sup> Based on the information in Mr. Ibaugh's email – specifically, that the technology had emerged in the time since DTS submitted its proposal several months earlier – Mr. Kotyk reasonably made a professional "judgment call" not to change his scoring of DTS's proposal based on the new information provided.<sup>193</sup> The remaining PEC members shared this reluctance.<sup>194</sup> It is well established that a protester's disagreement with the agency's judgment does not render the evaluation unreasonable. The PEC's scoring decision related to the software changes was not unreasonable.

In sum, the PEC members' testimony and score sheets are sufficient to establish that the members of the PEC considered each of the evaluation factors identified in the RFP. DTS has

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<sup>191</sup> See Post-hearing brief, p. 26.

<sup>192</sup> Kotyk testimony.

<sup>193</sup> Contrary to the suggestions of counsel, Mr. Kotyk did not feel that he needed more information in order to evaluate this new information. Rather, Mr. Kotyk had a threshold question of whether the PEC could consider the new information at all, given the apparent considerable change in DTS's approach to a technical issue after the submission of BAFOs. R. 3046-3048; Kotyk testimony.

<sup>194</sup> R. 3053, 3054.

not shown that the overall evaluations were unreasonable in light of the objective evidence as a whole.

### **C. Claims about July Discussions and Solicitation of BAFOs**

DTS makes several interrelated allegations about the scope of DOT&PF's pre-BAFO interactions with DTS and with Agile. DTS asserts that DOT&PF failed to engage in good faith discussions with DTS, that it engaged in unequal discussions, and that its discussions with Agile were really negotiations, all of which then resulted in "uneven" BAFOs.<sup>195</sup>

#### **1. Applicable Law**

Alaska Statute 36.30.240 ("Discussion with responsible offerors and revisions to proposals") authorizes discussions with offerors as follows:

As provided in the request for proposals, and under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers. In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors[.]

The Department of Administration's procurement regulations, in turn, lay out the process for clarification of proposals, discussions with offerors, and negotiations with successful offerors. First, 2 AAC 12.285 (Clarification of offers) provides:

In order to determine if a proposal is reasonably susceptible for award, communications by the procurement officer or the procurement evaluation committee are permitted with an offeror for clarification of uncertainties or elimination of confusion concerning the contents of a proposal that does not result in a material or substantive change to the proposal. The evaluation by the procurement officer or the procurement evaluation committee may be adjusted as a result of a clarification under this section.

Next, 2 AAC 12.290 ("Proposal discussions with individual offerors") addresses "discussions" with offerors, and the process for soliciting best and final offers, providing:

(a) Offerors of proposals reasonably susceptible for award as determined in the evaluation conducted under 2 AAC 12.260 may be offered the opportunity to discuss their proposals with the procurement officer or evaluation committee at

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<sup>195</sup> See Response to Protest Report, p. 10; Post-Hearing Brief, pp. 12-23.

the discretion of the procurement officer. The procurement officer may limit discussions to specific sections of the proposals received or specific sections of the request for proposals. The opportunity for confidential discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award. Auction techniques that reveal one offeror's price to another, and disclosure of any information derived from competing proposals, are prohibited.

(b) Any oral modification of a proposal resulting from proposal discussions under (a) of this section shall be reduced to writing by the offeror.

(c) Following discussions, the procurement officer may set a date and time for the submission of best and final proposals. Best and final proposals may be submitted only once. However, the chief procurement officer or the head of a purchasing agency may make a written determination that it is in the state's best interest to conduct additional discussions or change the state's requirements and require another submission of best and final proposals. Otherwise, discussion of or changes in the best and final proposals may not be allowed before award. If an offeror does not submit a best and final proposal or a notice of withdrawal, the offeror's previous proposal is considered the offeror's best and final proposal.

(d) The evaluation of a proposal may be adjusted as a result of a discussion under this section. The conditions, terms, or price of the proposal may be altered or otherwise changed during the course of the discussions provided the changes are within the scope of the request for proposals. After best and final proposals are received, final evaluations will be conducted as described in 2 AAC 12.260.

When a state agency elects to enter into discussions, it must accord fair and equal treatment to all offerors reasonably susceptible to award. The requirement of "fair and equal" discussions does not obligate an agency to discuss the same topics with both offerors, to discuss the same number of topics with both offerors, or even to engage in the same quantity of discussions with both offerors.<sup>196</sup> To be "fair and equal," however, discussions should be tailored to the individual proposals, and *qualitatively* comparable.<sup>197</sup> Even where discussions are not "fair and equal," a protestor must also show it was materially prejudiced by that inequality – that is, that the discrepancy deprived it of "a reasonable chance of receiving an award."<sup>198</sup>

## 2. The discussions were qualitatively unequal

"The requisite quality of discussions will not be measured according to whether the agency asked each offeror the same discussion questions; spent an equal amount of time in

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<sup>196</sup> *Aetna Life Ins.*, at 34.

<sup>197</sup> *Aetna Life Ins.*, at 34.

<sup>198</sup> *Aetna Life Ins.*, at 29, 32, 37 ("minimal irregularity" in discussions insufficient to sustain protest "because it could not meet the test for prejudice").



conducting discussions with each offeror; or discussed the same topics with each offeror.”<sup>199</sup> However, there is a requirement that discussions be “qualitatively” comparable. As to this requirement, DTS did meet its burden of proving that the discussions were unequal – although, as discussed below, not nearly to the extent alleged by DTS.

DTS asserts that the discussions were unequal because of the amount of time DOT&PF spent preparing the “negotiation items” list before discussions with Agile, as compared with the limited amount of time that elapsed between deciding to and actually holding discussions with DTS. Because it was anticipating entering into negotiations with Agile, DOT&PF reasonably spent time studying Agile’s proposal and identifying all possible items to clarify or address in negotiations. This effort resulted in the generation of the working list of “negotiation items.” When DOT&PF then decided to enter into discussions with both offerors, some of the topics on the negotiation items list were then discussed with Agile – albeit in a much more cursory level than would have been the case in “negotiations.”<sup>200</sup>

Because discussions occurred after negotiation preparations were halted, DOT&PF entered its discussions with Agile having more thoroughly reviewed Agile’s proposal immediately prior to the discussions. That fact alone does not render the discussions inherently unequal. Having undertaken to thoroughly mine Agile’s proposal for negotiation topics did not, in and of itself, obligate DOT&PF to afford DTS’s proposal a similar treatment prior to discussions. However, DOT&PF’s decision to actually include the “negotiation items” as discussion points with Agile *did* create some obligation for DOT&PF to seek to identify whether DTS’s proposal contains items of comparable concern. The failure to undertake this inquiry resulted in a qualitative inequality between discussions.

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<sup>199</sup> *CRA Associates, Inc., v. United States*, 102 Fed. Cl. 698, 716 (2011).

<sup>200</sup> The preponderance of the evidence supports a finding that the items on the “negotiation items” list were used in some way to inform the range of discussions with Agile. However, this does not mean that the discussions became “negotiations,” which I find they did not. Mr. Kotyk testified credibly that the group did not “negotiate” with either offeror during the July “discussions,” and that, to the extent items from the negotiation items list were raised, they were addressed narrowly. The content of Agile’s BAFO – specifically, the narrowly-contoured descriptions of the discussion topics – confirms that, where the “negotiation items” list may have been used to identify a discussion topic, the discussions that followed were not “negotiations.” R. 2982-2985. Indeed, as to some of the items, the interactions – such as DOT&PF’s questions about whether Agile contemplated a hardware refresh, or requests to update the dates on its GANTT chart – most closely resembled 2 AAC 12.285 “clarifications.”

The procurement officer has discretion to determine the scope of discussions.<sup>201</sup> Here, the decision to engage in discussions was related to the cost and structure of the hosting solution.<sup>202</sup> This was the only area in which the discussions actually implicated possible significant changes to either offeror's proposal. But DOT&PF also elected to include in its discussions with Agile a number of the items on the "negotiations items" list. Beyond the hosting issues discussed with both offerors, DOT&PF's discussion with Agile was tailored to needs for clarification as to various logistical issues in Agile's proposal (e.g. ensuring there would be updated dates, clarifying the plan for data migration, support desk hours) and strict compliance with RFP requirements (e.g. the source code escrow issue).

Many, if not all, of the items discussed with Agile and not with DTS were relatively minor issues in which Agile's proposal raised concerns not similarly implicated in DTS's proposal. And the requirement to hold discussions with both offerors does not create an obligation to hold identical discussions with both offerors or to discuss the same topics with both offerors. DOT&PF was not required to discuss issues with DTS for which there would be nothing to discuss.<sup>203</sup> However, the discussions were unequal in that DOT&PF discussed numerous items with Agile beyond the scope of its discussions with DTS without undertaking a review of DTS's proposal to identify comparable items for the DTS discussion.

While "agencies need not discuss every aspect of the proposal that receives less than the maximum score or identify relative weaknesses in a proposal that is technically acceptable but presents a less desirable approach than others," once DOT&PF decided to hold a discussion tailored to Agile's proposal as far as clarifying logistical questions about its proposal or ensuring compliance with RFP requirements, it should have ensured that its discussion with DTS was likewise tailored to any comparable issues in DTS's proposal.<sup>204</sup> It is not enough to say that DTS's proposal did not share the particular ambiguities that were discussed with Agile, and therefore these items were not raised with DTS. Given DOT&PF's decision to engage in

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<sup>201</sup> Discussions can be had "for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements." AS 36.30.240.

<sup>202</sup> See R. 2711-2713, 2942, 2945, 5824. DTS is simply not correct in asserting that the substantive nature of items on the "negotiation items" list prompted the switch from negotiations to discussions. See DTS Post-hearing brief, p. 15. Record evidence and testimony show that Ms. Morehouse's request to revisit the hosting costs is what led to that switch; the evidence does not support DTS's speculative characterization of these events.

<sup>203</sup> Mr. Ibaugh conceded that an agency may reasonably have different questions about different proposals, is not required to hold discussions with an offeror on topics about which the agency does not actually have questions, and is likewise entitled to ask more questions of one proposer than another. Ibaugh testimony.

<sup>204</sup> *Biospherics, Inc. v. United States*, 48 Fed.Cl. 1, 8 (2000).

discussions about items from its negotiation items list, the disparate level of discussion preparations, and DOT&PF's identification of only one minor non-hosting item for its discussion with DTS support a finding, by a preponderance of the evidence, that the discussions were not sufficiently tailored to DTS's proposal and, as such, were unequal.

3. DTS did not prove that it was materially prejudiced by the inequality in discussions

Although DOT&PF should have done more to prepare for its discussions with DTS in light of the breadth of topics it was discussing with Agile, DTS did not show that it was materially prejudiced by any qualitative difference in the discussions. To demonstrate prejudice, DTS must show that the alleged errors deprived it of "a reasonable chance of receiving an award."<sup>205</sup> The evidence as a whole does not support such a finding in this case.

a. *While the discussions were qualitatively unequal, the scope of that inequality was far less than what is alleged by DTS*

As a preliminary matter, the qualitative inequality between discussions was not nearly of the scope suggested by DTS. This is because the items discussed exclusively with Agile were far more minor concerns than the main focus of the discussions with both offerors: hosting costs.<sup>206</sup> To the extent that DTS's critique is of DOT&PF's failure to identify or raise in discussions substantive deficiencies in DTS's proposal, its critique seeks to expand the scope of discussions – something that was well within the agency's discretion to determine. DOT&PF's decision to discuss numerous relatively minor "punch list" items with Agile obligated it to undertake some effort to identify comparable items to discuss with DTS. It did not, however, obligate DOT&PF to identify or discuss major substantive issues with DTS.<sup>207</sup>

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<sup>205</sup> *Aetna Life Insurance*, at 29 (quoting *DBA Systems, Inc.*, B-224306, 86-2 Comptroller General Decisions, 722 (1986)).

<sup>206</sup> I do not find that DOT&PF personnel were substantively unprepared for the discussion they held with DTS. Mr. Kotyk was very familiar with both proposals at the time of discussions. And the procurement officer provided Mr. Hanley with DTS's proposal in advance of the discussions – in an email chain in which Mr. Hanley indicated that he was looking forward to getting "caught up with the whole process." R. 2934-2935. DTS's failure to raise any complaints about the discussions either in its bid protest or its appeal undermines its suggestion that DOT&PF personnel did not sufficiently prepare for the discussion with DTS or were not substantively engaged in that discussion. On balance, however, it is more likely true than not true that, had DOT&PF personnel been expressly asked to review DTS's proposal to identify possible topics for discussion, additional discussion topics could have been identified.

<sup>207</sup> Relatedly, Mr. Ibaugh's testimony attempting to characterize the relative significance of items on the "negotiation items" list was of little, if any, probative value. Mr. Ibaugh did not attend the discussions with Agile. He does not know, from looking at the list, the context in which a particular item was discussed. For example, he described the issue of "software source code" as "an important factor" and "an important issue in general." But, while software source code may well be an important issue, and could be the subject of in-depth negotiations, that

DTS's counsel asked Mr. Kotyk various questions about whether he raised issues in discussions in areas where he had downgraded DTS in his evaluation. For example, counsel asked whether Mr. Kotyk had brought up with DTS its failure to provide a GANTT chart, or his views of the suitability of DTS's provided references. DOT&PF was not required to use "discussions" to reopen issues on which an evaluator identified one offeror's proposal as clearly superior or inferior. Mr. Kotyk identified the complete absence of a GANTT chart in DTS's technical proposal as a significant "red flag" in evaluating DTS's overall approach to the project and appreciation of its scale.<sup>208</sup> Asking Agile to update the dates on its GANTT chart did not obligate DOT&PF to ask DTS to change its entire approach to project management. Arguments to the contrary misconstrue the limited scope of issues actually discussed with Agile, and ignore the procurement officer's discretion to limit the scope of discussions.

DTS's characterizations of the discussions with Agile are not supported by the record. DTS claims that "DOT engaged Agile in meaningful discussions about significant structural components."<sup>209</sup> The evidence does not support this characterization. The "discussion" with Agile lasted for less than ninety minutes and covered nine topics. Agile's BAFO summarizes the vast majority of the "discussion" topics as limited to DOT&PF identifying an RFP requirement (e.g. that software code must be put into escrow, or that Agile needed to identify its plan for data migration), and its BAFO response is then limited to acknowledging that requirement. Contrary to DTS's suggestion, Agile's BAFO did not make "significant structural changes" to its technical proposal. The vast majority of changes reflected in Agile's BAFO are minor clarifications or acknowledgements of the need to comply with a stated RFP requirement.

To the extent that DTS is arguing that DOT&PF was required to identify in discussion its various fundamental concerns with the DTS proposal, this argument is misplaced. The decision to enter into discussions did not obligate DOT&PF to ask DTS to remedy what PEC members saw as significant, structural problems with DTS's proposal. DTS argues that Mr. Kotyk "could and should have" raised with DTS in discussions various areas where he had identified DTS's

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does not mean that it was discussed in-depth during discussions. The uncontradicted testimony was that the "discussion" of software source code with Agile was limited to DOT&PF telling Agile the RFP required offerors to provide source code in escrow, and Agile saying it would do so. Mr. Ibaugh's speculative assumptions about what a term on the "negotiation items" list might have meant during discussions were not persuasive.

<sup>208</sup> Kotyk testimony.

<sup>209</sup> Post-hearing brief, p. 14.

proposal as frankly deficient.<sup>210</sup> As an example, DTS then argues that Mr. Kotyk should have raised “DTS’s lack of a critical path in its GANTT chart.”<sup>211</sup> But the problem identified by Mr. Kotyk was not that a particular item was missing from DTS’s GANTT chart. Rather, the problem was that DTS’s proposal did not include a GANTT chart *at all* – and, therefore, also did not include a “critical path,” which is one component of a GANTT chart.<sup>212</sup>

Turning then to the discussion with Agile about its GANTT chart, that discussion was limited to requesting that Agile update the dates on its GANTT chart to reflect the current project timelines. The timelines in DTS’s proposal already reflected the changed timelines – but were not set out in a GANTT chart. Mr. Kotyk believed that the failure to provide a GANTT chart at all was suggestive of a larger problem of DTS failing to appreciate the scope of the DOT&PF asset management project. The minor request to Agile to update its dates did not affect the fundamental content of its proposal or its understanding of the scope of the asset management project, nor was DOT&PF required to engage DTS in discussions on this far more major issue of concern.

In short, outside of the issue of hosting costs, which was discussed with both offerors, the discussions with Agile concerned relatively minor clarifications. While there was a qualitative inequality in DOT&PF’s failure to tailor discussions with DTS to DTS’s proposal, the discussions were not unequal as to major substantive areas of discussion.

*b. DTS did not meet its burden of proving prejudice*

Nor did DTS meet its burden of proving that it was prejudiced by any qualitative differences in discussions. DTS’s prehearing brief identified the prejudice related to the discussions as follows: “Had DTS been given opportunity to engage in discussions, the firm could have supplied additional information regarding its staffing proposal, which would have led to a higher ruling under this evaluation factor.”<sup>213</sup> But DTS presented no evidence on this issue at the hearing.

At the hearing, DTS’s main argument was that discussions should have included the third-party software issue, and that, if that issue had been discussed prior to BAFOs, DTS could have convinced the PEC that the information it later provided in Mr. Ibaugh’s August 18 email

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<sup>210</sup> Post-hearing brief, p. 17.

<sup>211</sup> See DTS Post-hearing brief, p. 17.

<sup>212</sup> Kotyk testimony.

<sup>213</sup> DTS prehearing brief, p. 21.

warranted a score increase. But even if DOT&PF should have raised the third party software issue earlier, the testimony at the hearing does not support DTS's claim that discussion of the software issue during the July discussions was likely to have altered the PEC members' assessment of this issue. Mr. Ibaugh's August 18 email described the significant changes to VUEWorks as having been made since DTS responded to the RFP.<sup>214</sup> DTS's brief argues that Mr. Ibaugh was referring to the original proposal submissions in December 2014, not the May 2015 proposals in response to Amendment 5. DTS did not present evidence that this is the case. Moreover, the specific part of the proposal in which third-party software was repeatedly referenced was in the "System Requirements" DTS document submitted in response to Amendment 5.<sup>215</sup> Thus, as of May 11 2015, DTS was actively taking the position that it required third-party software to meet these requirements.

DTS claims in its brief that substantive discussions about modifications to VUEWorks would have enabled it to submit "information about where and how the new functionality was being used by other government entities on the ground."<sup>216</sup> DTS then provides a string of record cites with a parenthetical description: "states using internal VueWorks."<sup>217</sup> The citations provided are to pages in DTS's original November 2014 technical proposal. In both that proposal and in DTS's May 2015 response to Amendment 5, DTS indicated that dozens of EMS needs would have to be met through third-party software. Whatever significance DTS now wants to assign to these documents, this testimony was not presented at hearing. Moreover, that some DTS client had been using the recently developed software components "for six months," as Mr. Ibaugh testified, does not change the facts (1) that DTS did not feel sufficiently confident in the product to identify it as fully responsive in its May 2015 response to Amendment 5, or (2) that members of the PEC reasonably did not want to rely on a product that new.

Likewise, while DTS claims in its briefing that the changes at issue were actually showcased during the live demonstrations, it did not present evidence supporting this claim.<sup>218</sup> Moreover, Mr. Bylsma testified that his concerns related to unmet needs, and DTS's referral to

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<sup>214</sup> R. 3044.

<sup>215</sup> R. 2797-2858. DTS also identified a need for third-party software for some EMS functions in its December 2014 proposal. R. 1293-1295, 1298-1300, 1303-1304. But the renewed identification of this need in its separate May 2015 Response to Amendment 5 belies the suggestion that the software developments were not recent.

<sup>216</sup> Post-hearing brief, p. 21.

<sup>217</sup> Post-hearing brief, p. 21 and fn. 96.

<sup>218</sup> See Post-hearing brief, p. 20 (citing Amendment 5 to RFP, but not citing evidence regarding how it supposedly addressed this issue during live demonstrations).

third-party software persisted after the live demonstrations. DTS’s post-hearing brief also incorrectly asserts that DTS’s live demonstrations satisfied each of the items required in the scripts; testimony and score sheets show that DTS failed to produce four of the five required system checks. Even if DTS’s claim about the demos was accurate – something it failed to prove at the hearing – DTS does not explain why it would have referenced third-party software so often in its May 2015 proposal if its own software was already equipped to perform these tasks a few weeks later.

Mr. Kotyk testified persuasively that, as an experienced IT professional, he would have significant concerns about employing a very new software product. Mr. Ibaugh testified that he could have, in discussions, clarified that the product was being used by other states. But he also testified that it was not certain that the modifications would work for Alaska. This is consistent with the language of his email, which stated that DTS “believed” that these changes would obviate the need for third-party software; as he admitted in his testimony, uncertainties still exist. The testimony of Mr. Kotyk and Mr. Bylsma establish that their reluctance to increase DTS’s scores was rooted in the newness of the software changes, and their professional judgments about the risks inherent in adopting newly-developed software. In light of the foregoing, DTS did not demonstrate that “discussions” on the issue of its suggested reliance on third-party software would have increased DTS’s chances of securing the asset management contract.<sup>219</sup>

As held above, DOT&PF’s non-hosting discussions with Agile did not, as DTS avers, concern “significant structural components” of Agile’s proposal.<sup>220</sup> The one change that Mr. Kotyk found significant – one for which he awarded Agile at most five points – was in Agile’s treatment of the software source code escrow requirement. Mr. Kotyk explained that the additions made by Agile in its BAFO were “above and beyond” what he expected based on the discussions, which were limited to directing Agile to ensure that its proposal properly provided for source code escrow. Agile’s treatment of that requirement in its BAFO was “above and beyond” the minimal requirements of the RFP or the request made during discussions, and it was this depth of treatment that led Mr. Kotyk to increase his score by 5 out of the total 1000 points.<sup>221</sup>

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<sup>219</sup> See *Aetna Life Ins.*, at 29.

<sup>220</sup> Post-hearing brief, p. 14.

<sup>221</sup> Kotyk testimony; R. 0017-0030.

DTS did not present any evidence to suggest that it was prejudiced by the inclusion of this topic as a discussion item with only Agile, when DTS’s proposal already addressed the source code escrow requirement. DTS did not present evidence of how it would have changed its own proposal had this item been included in its discussions. And DTS did not present evidence that any such changes were likely to have changed the scoring outcome.<sup>222</sup> Nor did DTS present evidence of any substantively comparable proposal items that, had they been included in discussions, would have led to similar changes in its proposal – let alone leading to changes sufficient to impact DTS’s likelihood of receiving the award.<sup>223</sup>

Even if DTS could make such a showing, the change in Agile’s scoring as a result of this one technical change was so small as to be immaterial. “A [change] of five points is relatively small and well within the substantive discretion of the evaluators.”<sup>224</sup> Here, only one evaluator awarded any additional points, and then it was only five points. As a result, Agile’s average technical score increased by fewer than two points due to its BAFO changes.<sup>225</sup> In the context of the 48-point score gap between the two proposals, the 1.6 point increase to Agile’s technical score was not prejudicial to DTS.

In light of the foregoing – including the narrow scope of the other Agile discussion topics; the fact that two of three PEC members made no changes as a result of Agile’s BAFO, and the other only increased his score by 5 out of 1000 points; the fact that Agile’s overall score in fact decreased as a result of BAFOs; the reasonableness of the PEC’s conclusions about the software changes; DTS’s failure to show what other changes it would have made to its proposal; and DTS’s failure to show any likelihood of overcoming the 48-point score gap – DTS did not meet its burden of showing that it was prejudiced by the qualitative difference in discussions.

4. DTS did not meet its burden of proving that the discussions were held in bad faith

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<sup>222</sup> Other than saying that typically if an offeror is asked fewer questions it is because its proposal was scored higher, Mr. Ibaugh – the only witness from DTS – did not identify any specific manner in which DTS had been prejudiced or specific ways it would have changed its proposal – beyond the third-party software issue – given the opportunity to do so.

<sup>223</sup> See, e.g. *Academy Facilities Management v. United States*, No. 09-302C (2009), at 25 (rejecting offeror’s prejudice claim as “speculative” and “crystal ball gazing,” where “even if plaintiff’s eight additional overstated line items had been identified and brought to plaintiff’s attention during discussions, plaintiff cannot demonstrate that it had a substantial chance of receiving the award”).

<sup>224</sup> *Global Positioning Services*, at 12.

<sup>225</sup> Since one PEC member increased his score by 5 points, and the other two made no changes, the average score (on non-cost items) changed by 1.67 out of 1000 points.



Lastly, DTS also asserts that DOT&PF's discussions with DTS were not held in good faith. In its post-hearing brief, DTS asserts that DOT&PF "never intended to have meaningful discussions with DTS," and that its discussion with DTS was done "simply to paper the record."<sup>226</sup>

The testimony at the hearing does not support DTS's speculative narrative. The procurement officer testified to her belief that, once certain issues arose in the negotiation preparations, DOT&PF was required to engage in discussions with both offerors rather than engaging in negotiations with one.<sup>227</sup> Her contemporaneous July 13 email supports this testimony.<sup>228</sup> DTS is correct that Ms. Gattung's testimony was inconsistent with the written record as to the timing of (1) the decision to conduct discussions about the state hosting option, and (2) the realization that Amendment 7 had failed to clearly identify the actual cost of ETS hosting. Specifically, Ms. Gattung's testimony suggested that these events arose contemporaneously, and that both issues informed the decision to commence discussions, but the record contains an email from Mr. Kotyk identifying this issue as a possible concern the morning of July 16, the day of the discussions, rather than arising earlier that week.<sup>229</sup>

To overcome the presumption of good faith in the procurement process, "a protestor must provide direct evidence of actual bias or prejudice, rather than speculation or inference."<sup>230</sup> Ms. Gattung's incorrect recollection about the sequence of these close-in-time and related events is not evidence of bad faith in the discussion process. Furthermore, that the decision to include the specific topic of state hosting costs was made several days after the decision to hold discussions does not undermine the good faith nature of either decision. It is undisputed that, by the time discussions occurred, DOT&PF had made the discretionary decision to discuss hosting issues with both offerors. This was an appropriate decision, and one that ultimately benefited DTS.

No one who actually attended the Agile discussion testified that that discussion was really a "negotiation," and no one who attended the discussions with both offerors described those two discussions as appreciably different in nature or tone. Chris Kotyk firmly testified that

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<sup>226</sup> DTS post-hearing brief, p. 16.

<sup>227</sup> Gattung testimony.

<sup>228</sup> R. 2711-2713.

<sup>229</sup> R. 2940-2941.

<sup>230</sup> *Global Positioning Services*, at 11.

he was not involved in “negotiations,” and that the July interactions with Agile – as well as with DTS – were “clearly discussions and not negotiations.”<sup>231</sup>

The evidence DTS cites for alleged bad faith is not persuasive. DTS claims that an August 14, 2015 email from Chris Kotyk shows “that DOT’s pre-discussion to award to Agile never changed,” alleged because the email “set forth a negotiation point for Agile even though the PEC had not conducted a final evaluation.”<sup>232</sup> But the email does not “set forth a negotiation point for Agile.” Rather, Mr. Kotyk identifies an issue “related to the *BAFOs*” – as to the content of the software escrow package. The specific nature of the software escrow agreement would eventually be an issue with whichever offeror was selected. Mr. Kotyk’s identification of an issue for DOT&PF to address in an eventual agreement with the eventual awardee was not, as DTS suggests, evidence of improper motive.

Also not persuasive evidence of predecision is the August 17, 2015 email exchange between Mr. Garvey and Ms. Gattung. Mr. Garvey emailed Ms. Gattung on August 17 to confirm that she had received an August 13 email and that DOT&PF had everything it needed from Agile.<sup>233</sup> Ms. Gattung responded that she had received the email and that DOT&PF had all the information it needed. She added “we should be able to begin negotiations the end of this week or possibly next week, depending on everyone’s schedules.”<sup>234</sup> DTS argues that this email is evidence of pre-selection of Agile. But neither the plain language of the email, nor testimony, nor other contemporaneous emails, supports that interpretation. Rather, the email is most fairly read as providing a neutral update on the timing of the process, with the procurement officer stating that DOT&PF would be able to begin negotiations with the successful offeror – whoever that turned out to be –the following week.

Particularly in light of the presumption of good faith, DTS failed to prove that DOT&PF acted in bad faith vis-à-vis its “discussions” with the two offerors.

#### **D. Claims about DOT&PF’s Consideration of BAFOs**

In prehearing pleadings, DTS asserted that DOT&PF failed to fairly evaluate DTS’s BAFO.<sup>235</sup> When initially asserted in DTS’s protest, this argument was based on the lack of

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<sup>231</sup> Kotyk testimony.

<sup>232</sup> DTS Post-Hearing brief, p. 16, fn. 78, citing R. 3037.

<sup>233</sup> R. 5469-5470.

<sup>234</sup> R. 5471-5473.

<sup>235</sup> Response to Protest Report, p. 10; DTS Prehearing brief, pp. 1,14.

revised PEC score sheets for DTS. But DTS’s original BAFO did not contain technical changes. The only change was to cost, an item scored on a formula basis by the procurement officer. The procurement officer was not required to resubmit DTS’s technical proposal for another round of scoring when DTS had made no technical changes.

Further, once a technical change emerged in post-BAFO clarifications, all three PEC members were asked whether DTS’s post-BAFO changes affected their scoring. Each member said no, and explained the basis for that decision. While DTS agrees with the PEC’s reasoning, the PEC’s decision about the late-announced software changes was well within its professional judgment, as discussed above. In short, the record reflects that the PEC did adequately consider DTS’s BAFO – including the post-BAFO change in its technical proposal.<sup>236</sup>

DTS has also asserted that Agile’s BAFO made technical changes that were impermissibly beyond the scope of its original proposal. Specifically, DTS’s protest complained that Agile was impermissibly allowed to change its approach to hosting after the demonstration period.<sup>237</sup> But the evidence clearly established that Agile never changed its approach to hosting.

Lastly, DTS has also asserted that Agile was improperly asked and allowed to clarify its BAFO after submitting it. Specifically, on August 13, 2015, the procurement officer emailed Joe Garvey with questions about Agile’s BAFO.<sup>238</sup> These questions were not improper, and Mr. Garvey’s response was largely limited to confirming information already in Agile’s original proposal or in its BAFO.<sup>239</sup> These were clarifications, not discussions, and were permissible under 2 AAC 12.285. The regulations allow clarifications after proposals are submitted, and before they are evaluated, “to clarify uncertainties or eliminate confusion concerning the contents of a proposal.”<sup>240</sup> The regulations do prohibit further *discussions* after BAFOs are submitted, unless specifically authorized by the Chief Procurement Officer.<sup>241</sup> But it would make no sense to read the regulations as prohibiting clarifications between BAFOs and final evaluation of those BAFOs. Just as it may do with original proposals, an agency may seek to “clarify uncertainties or eliminate confusion concerning the contents of” a best and final offer. It

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<sup>236</sup> It was probably error for DOT&PF to allow DTS to submit this substantive *technical change* after BAFOs had been submitted. However, this error did not prejudice DTS, and is not squarely an issue on appeal.

<sup>237</sup> Protest, pp. 8-9.

<sup>238</sup> R. 3031.

<sup>239</sup> See R. 5467-5468.

<sup>240</sup> 2 AAC 12.285.

<sup>241</sup> 2 AAC 12.290(c); *but see Aetna Life Ins.*, at 36-37 (such discussions may be harmless error).

was not improper for the procurement officer to ask clarifying questions regarding Agile's BAFO.<sup>242</sup>

In short, I find that DOT&PF properly considered and evaluated both offerors' BAFOs, and that any minor procedural irregularities in doing so – namely, allowing DTS's substantive technical change – did not prejudice DTS.<sup>243</sup>

**E. Claims that DOT&PF Improperly Negotiated with Agile After BAFOs**

DTS separately contends that DOT&PF erred in negotiating contract terms after BAFOs were scored and Agile was identified as the highest scoring offeror. However, both the procurement regulations and the RFP expressly authorize DOT&PF to negotiate with the highest scoring offeror. 2 AAC 12.315 specifically authorizes contract negotiations "after final evaluation of proposals," providing in relevant part:

[T]he procurement officer may negotiate with the offeror of the highest ranked proposal for the purpose of obtaining contract terms consistent with the solicitation and with terms favorable to the state. If changes are made to the proposal during contract negotiations, the changes must be reasonable; however, the changes may not have the effect of changing the ranking of the highest ranked proposal.<sup>244</sup>

The RFP likewise specifically provides that negotiations with the highest scored offeror will occur after final evaluation.<sup>245</sup> Section 2.13 allows for such negotiations "after final evaluation," and requires that any such negotiations "be within the scope of the request for proposals and limited to those items which would not have an effect on the ranking of proposals."<sup>246</sup> Section 2.15 expressly provides that Notice of Intent to Award will be issued "after the completion of contract negotiation."<sup>247</sup>

DTS relies on *Nana Management Services* for the proposition that even legally permissible negotiations can be grounds to invalidate a procurement.<sup>248</sup> But *Nana Management*

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<sup>242</sup> Of course, DTS was likewise asked clarifying questions about its own technical proposal after BAFOs were submitted.

<sup>243</sup> To the extent DTS is claiming that DOT&PF did not fairly evaluate its BAFO because the PEC members did not raise their scores after DTS's technical change (see DTS Prehearing brief, p. 14; DTS post-hearing brief, pp. 21-22), that claim has been addressed above.

<sup>244</sup> 2 AAC 12.315.

<sup>245</sup> R. 0066-0067. Neither party protested this provision during the solicitation. See R. 0067 (Section 2.16: Protest); AS 36.30.560.

<sup>246</sup> R. 0066. While Mr. Ibaugh testified he did not know he could propose contrary contract terms in DTS's proposal, Section 3.04 of the RFP expressly allows offerors to do just that. R. 0068.

<sup>247</sup> R. 0067.

<sup>248</sup> *Nana Management Services LLC v. Department of Transportation & Public Facilities*, OAH No. 09-0068-PRO (Commissioner of Transportation 2010).

is not persuasive here for several reasons. As a preliminary matter, *Nana Management* was a decision by a former Commissioner of DOT&PF, not a decision of either an administrative law judge or the Commissioner of Administration. Its interpretations of the procurement regulations are not controlling.<sup>249</sup> Nor do I find them persuasive. In *Nana Management*, the DOT&PF Commissioner concluded that the negotiations at issue had not violated the law.<sup>250</sup> And he concluded that the outcome likely would not have been different in any event – that is, that *Nana* was not actually prejudiced by the negotiations. He nonetheless proceeded to invalidate the procurement. By way of contrast, in *Aetna*, a Department of Administration decision, the Commissioner’s designee concluded that post-BAFO discussions were “technically contrary to law.” But the lack of prejudice – specifically, the finding that these unequal discussions “likely did not have much impact” on the competition between the two offerors – precluded a finding in favor of the protestor based on those events.<sup>251</sup>

Here, I do not find the negotiations improper as a matter of law, nor can I accept *Nana*’s suggestion that legally proper and non-prejudicial negotiations could somehow serve as a basis to sustain a protest. The RFP specifically allows that negotiations will occur before a contract is actually awarded. DTS has not shown that the negotiation of items such as the content of the software license or others contract terms and conditions was improper. To the contrary, the negotiation of such terms is expressly authorized by statute, regulation and the RFP. And, as DTS concedes, the negotiations did not violate 2 AAC 12.315’s only express limit on negotiations – that they may not have the effect of changing the ranking of the highest ranked proposal.<sup>252</sup> Under these circumstances, the negotiations were proper, and DTS’s claim to the contrary fails.

## **VI. Conclusion**

This was a lengthy and complex procurement process involving highly technical proposals and inherently subjective decisionmaking. While the process of switching from negotiation preparations to discussions with offerors led to slight, inadvertent procedural error as to the qualitative scope of those discussions, that error was harmless. DOT&PF’s scoring of

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<sup>249</sup> *Accord Nana Management* at p. 11 (declining to reach definitive interpretation of 12.315; recognizing that “definitive interpretation of that regulation falls within the purview of the Department of Administration”).

<sup>250</sup> *Nana Management*, at pp. 7 (“AS 36.30.240 does not prohibit negotiations after final evaluation”), 10 (“2 AAC 12.315 does not expressly prohibit negotiations after final evaluation”).

<sup>251</sup> *Aetna Life Ins.*, at 36.

<sup>252</sup> DTS Post-hearing brief, at 32.

proposals and ultimate selection of Agile was based on thoughtful and reasoned analysis, and will not be disturbed. For the reasons set forth above, DTS's protest is denied.

DATED: April 6, 2016, *nunc pro tunc* to March 23, 2016.

By: Signed \_\_\_\_\_  
Cheryl Mandala  
Administrative Law Judge

### **Adoption**

This Order is issued under the authority of AS 36.30.675 and AS 36.30.680. The undersigned, in accordance with AS 44.64.060, hereby adopts this Revised Decision as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision

DATED this 6<sup>th</sup> day of April, 2016.

By: Signed \_\_\_\_\_  
Sheldon Fisher  
Commissioner of Administration

[This document has been modified to conform to the technical standards for publication.]